Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT W. "BOBBY" UNSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a person can be convicted of a crime without proof of *mens rea*:

   A. In the absence of a clear indication on the part of Congress to dispense with the *mens rea* requirement; and

   B. When the crime does not satisfy the requirements for a "public welfare offense" as established by *Morissette v. United States*, 342 U.S 246 (1952), and its progeny?

2. Whether a court may shift the burden of proof of an affirmative defense to the defendant, in the absence of an Act of Congress authorizing that shift, without violating the Due Process Clause of the Fifth Amendment?

LIST OF PARTIES

The United States of America was Plaintiff in the United States District Court for the District of Colorado and Appellee before the United States Court of Appeals for the Tenth Circuit.

Robert W. "Bobby" Unser was Defendant in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, *United States of America v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999), which appears at pages App. 1 to App. 29 of the Appendix. The ruling of the United States District Court for the District of Colorado, issued June 12, 1997, appears at pages App. 35 to App. 50 of the Appendix. The unpublished judgment of the United States District Court for the District of Colorado, dated June 17, 1997, *United States of America v. Robert W. Unser*, Case Number 97-CR-110-B, appear at pages App. 32 to App. 34 of the Appendix.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the United States Court of Appeals for the Tenth Circuit on January 4, 1999. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "no person shall be . . . deprived of life, liberty or property, without due process of law . . . ," is at issue in this case.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this petition include:

> 16 U.S.C. § 551 provides, in pertinent part, "The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations . . . to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both."
>
> 16 U.S.C. § 1133(c) provides, in pertinent part, "Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies. [T]here shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."
>
> 18 U.S.C. § 3231 provides, in pertinent part, "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."
>
> 18 U.S.C. § 3232 provides, in pertinent part, "Proceedings to be in district and division in which offense committed, [FRCP] Rule 18."

18 U.S.C. § 3571 (b)(6) provides, in pertinent part, "[A]n individual who has been found guilty of an offense may be fined . . . for a Class B . . . misdemeanor that does not result in death, not more than $5,000. . . . "

28 U.S.C. § 1291 provides, in pertinent part, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

36 C.F.R. § 261.2 provides, in pertinent part, "*Motorized equipment* means any machine activated by a nonliving power source except small battery-powered handcarried devices such as flashlights, shavers, Geiger counters, and cameras. *Motor vehicle* means any vehicle which is self-propelled or any vehicle which is propelled by electric power obtained from batteries, but not operated on rails."

36 C.F.R. § 261.16(a) provides, in pertinent part, "The following are prohibited in a National Forest Wilderness (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation. . . . "

STATEMENT OF THE CASE

On January 8, 1997, Petitioner, Robert W. "Bobby" Unser, was charged with unlawful possession and operation of a motor vehicle within a national forest wilderness area in violation of 16 U.S.C. § 551 and 36 C.F.R.

§ 261.16(a). The United States District Court for the District of Colorado had original jurisdiction over the case pursuant to 18 U.S.C. §§ 3231 and 3232.

On March 10, 1997, Mr. Unser waived his right to be tried before a magistrate judge and pled not guilty to possessing and operating a motor vehicle in a wilderness area and aiding and abetting the possession and operation of a motor vehicle in a wilderness area. Prior to trial, the District Court ruled that violations of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) are strict liability offenses, that is, "public welfare offenses," and do not require the United States to prove that Mr. Unser possessed *mens rea*. Thereupon, the United States dismissed the aiding and abetting charge against Mr. Unser.

Trial commenced on June 11, 1997, and lasted two full days. On June 12, 1997, the District Court found Mr. Unser guilty and fined him seventy-five dollars. The District Court held that conviction under 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) did not require proof of Mr. Unser's *mens rea*. The District Court held, pursuant to its *mens rea* ruling, that Mr. Unser bore the burden of proof of the necessity defense. The District Court further held that the United States had proven its case beyond a reasonable doubt and that Mr. Unser was guilty of a Class B misdemeanor that, under 18 U.S.C. § 3571(b)(6), carried a potential fine of $5,000. Judgment was entered on June 17, 1997. Mr. Unser moved the District Court to stay enforcement of the penalty pending appeal, and in an order dated June 27, 1997, the District Court granted the motion.

Mr. Unser timely filed a Notice of Appeal with the United States Court of Appeals for the Tenth Circuit on June 26, 1997. The United States Court of Appeals for the Tenth Circuit, exercising appellate jurisdiction pursuant to 28 U.S.C. § 1291, heard oral arguments on March 20, 1998. On January 4, 1999, in *United States of America v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999), the Tenth Circuit upheld the District Court's holding that violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) constitutes a "public welfare offense," and therefore conviction does not require the United States to prove *mens rea*. The Tenth Circuit further held that the District Court did not err in placing the burden of proof of the necessity defense on Mr. Unser. Thus, the Tenth Circuit affirmed Mr. Unser's conviction.

On January 27, 1999, the District Court advised Mr. Unser that the original penalty imposed by that Court was due. Mr. Unser moved the District Court on February 3, 1999, to stay enforcement of the penalty pending appeal to this Court. The District Court granted Mr. Unser's motion to stay enforcement of the penalty pending further appeal on February 4, 1999.

STATEMENT OF FACTS

At noon on December 20, 1996, Robert W. "Bobby" Unser (Mr. Unser) and Robert Gayton (Mr. Gayton) set off on a snowmobile trip to the Jarosa Peak area of the Rio Grande National Forest in southern Colorado, an area Mr. Unser had snowmobiled in many times over the past several years. Because Mr. Gayton had never driven a

snowmobile, prior to leaving Mr. Unser's home, Mr. Unser instructed him on how to operate the snowmobile. Mr. Gayton then practiced for several minutes. Mr. Unser chose the Jarosa Peak area as his snowmobiling destination because he knew that it was a short distance from the roadside parking lot (the Red Lake Trail parking lot) and would be an easy and interesting ride for the inexperienced Gayton. When Mr. Unser and Mr. Gayton arrived at the Red Lake Trail parking lot, Mr. Gayton operated a snowmobile for a period of time to familiarize himself with the snowmobile and the snow conditions.

When the two snowmobilers left the Red Lake Trail parking lot, the weather was clear with unlimited visibility. However, while Mr. Unser and Mr. Gayton were riding the snowmobiles at the Jarosa Peak area, a severe ground blizzard occurred, causing blowing and drifting snow that reduced visibility to near zero. Suddenly, Mr. Unser's snowmobile began having mechanical problems necessitating attempts by Mr. Unser to repair the snowmobile during near whiteout conditions. The situation quickly became life threatening because of the frequently malfunctioning snowmobile, the furious blizzard, the plummeting temperature, and the rapidly rising snow depth. At that time, Mr. Unser realized that he and Mr. Gayton were in imminent danger of serious harm or death.

The blowing snow and other conditions of the blizzard caused Mr. Unser and Mr. Gayton to become disoriented and lost as they frantically attempted to identify their location and to discover a route back to their parked truck and safety. Soon thereafter, scarcely able to see past

the front of the snowmobile, Mr. Gayton drove his snowmobile off a steep embankment into a drainage area where it became hopelessly stuck. Realizing that it was futile to attempt to move Mr. Gayton's machine, both Mr. Unser and Mr. Gayton resumed their desperate search for safety on Mr. Unser's snowmobile. Mr. Unser's snowmobile continued to have mechanical problems and repeated breakdowns necessitating numerous efforts to get the snowmobile running again. Shortly before dark, Mr. Unser's snowmobile completely broke down. Mr. Unser and Mr. Gayton abandoned the snowmobile and walked into the trees, through high snowdrifts, during blinding blizzard conditions, in an attempt to reach some degree of safety.

When darkness fell, Mr. Unser and Mr. Gayton hand-dug a snow cave in which to spend the night because exposure to the bitter conditions had caused frostbite and near hypothermic symptoms in both men. The following day, December 21, 1996, the two men resumed walking in the dangerous and hostile conditions. Suddenly, Mr. Unser and Mr. Gayton slid down a steep cliff to the bottom of a vast valley. The 63-year-old Unser grew ill and vomited several times. Mr. Gayton, whose physical condition was even worse than Mr. Unser's, sought on several occasions to lie down to die; only Mr. Unser's persistence kept Mr. Gayton alive. The two men continued to hike in search of safety despite their debilitated state. They walked the entire day and through the second night. In the early morning hours of the third day, December 22, 1996, Mr. Unser and Mr. Gayton discovered a barn within which Mr. Unser found a telephone with which he contacted his brother, Al Unser. Mr. Unser and

Mr. Gayton were taken to a local hospital for treatment for exhaustion, frostbite, dehydration, and related ailments.

On January 7, 1997, still not fully recovered from this nearly fatal experience, Mr. Unser contacted the United States Forest Service in Albuquerque, New Mexico, in an attempt to retrieve his lost snowmobiles. He was told to come to the Forest Service office for a meeting designed to help find his snowmobiles. During this meeting, Mr. Unser could not identify any specific area in which the snowmobiles could have been abandoned.

Unbeknownst to Mr. Unser, Forest Service officials were conducting an ongoing criminal investigation of him. As part of that investigation, Forest Service officials requested that Mr. Unser return to the Forest Service office on January 8, 1997, to review maps and photographs for the purpose of locating his snowmobiles.

During Mr. Unser's meeting with the Forest Service officials, one Forest Service employee produced a prewritten citation and presented it to Mr. Unser. The citation charged that Mr. Unser unlawfully possessed and operated a motor vehicle within a national forest wilderness area in violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) and that he aided and abetted Mr. Gayton in a violation of the same provisions.

REASONS FOR GRANTING THE WRIT

Congress authorized the Secretary of Agriculture to "make such rules and regulations [necessary] to regulate

[the] occupancy and use [of the national forests] and to preserve the forest thereon from destruction." 16 U.S.C. § 551. Congress also prohibited the "use of motor vehicles [or] motorized equipment . . . within any [federal wilderness] area." 16 U.S.C. § 1133(c). On the basis of these two statutory provisions, the U.S. Forest Service "prohibited . . . possessing or using a motorized vehicle . . . or motorized equipment [in a federal wilderness area]." 36 C.F.R. § 261.16(a).

In upholding the conviction of Robert W. "Bobby" Unser for "possessing and operating" a motorized vehicle in a wilderness area, the U.S. Court of Appeals for the Tenth Circuit held that Mr. Unser's crime was "a public welfare offense" that did not require proof of *mens rea*.

Contrary to the express holdings of this Court, the Tenth Circuit did not base its holding on an indication of the intent of Congress, since no such intent exists. Furthermore, contrary to the express holdings of this Court, the Tenth Circuit reached its holding despite its own finding that Mr. Unser's activity did not "seriously threaten a community's health or safety." Finally, again contrary to the express holdings of this Court, the Tenth Circuit not only rejected the "traditional rule" that offenses not requiring *mens rea* are "generally disfavored," but also criminalized "a broad range of apparently innocent conduct."

Moreover, the Tenth Circuit's holding that Mr. Unser's crime was a public welfare offense formed the basis for that court's holding, contrary to the Constitution, the holdings of this Court, and the holdings of other

federal courts of appeals, that the burden of proof for the necessity defense could be shifted to Mr. Unser.

The Tenth Circuit's holding also conflicts with the holdings of other federal courts of appeals that statutory language similar to the statutory terms "possessing or using" at issue in this case, that is, "placing or allowing," and "permit[ting] or suffer[ing]," imposed a *mens rea* requirement. Finally, the Tenth Circuit's holding conflicts with the seven-part test adopted by at least one federal court of appeals, which is based on the precedents of this Court, for determining what constitutes a public welfare offense.

This incredible action by the United States, the prosecution of a man who narrowly escaped death in a dangerous blizzard in the Colorado high country, shocks the conscience. However, even more shocking is the holding of the Tenth Circuit that, in the course of that prosecution, the United States was not required to prove *mens rea*. Thus, the holding of the Tenth Circuit not only creates a true, direct, intolerable, and irreconcilable conflict with the decisions of this Court and other federal courts of appeals, it also demonstrates the vital necessity that this Court issue a definitive and controlling ruling regarding the nature and scope of "public welfare offenses." Otherwise Mr. Unser will be just the first of many annual visitors to federal lands who may be held strictly liable for "a broad range of apparently innocent conduct."

I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS RENDERED BY THE UNITED STATES SUPREME COURT.

A. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Supreme Court In *Staples v. United States*.

In *Staples v. United States*, 511 U.S. 600 (1994), this Court granted certiorari "to resolve a conflict in the Courts of Appeals concerning the *mens rea* required under [the National Firearms Act]." *Id.* at 604. Staples appealed his conviction for possession of a fully automatic rifle in violation of the National Firearms Act (Act) based on the fact that he had no knowledge that the rifle was fully automatic; in fact, he believed that he was in possession of a rifle that was, at all times, only a semi-automatic rifle that complied with the Act. *Id.* at 603. The United States, arguing that the Act created a public welfare offense, insisted that no *mens rea* was required for conviction.

This Court began its analysis with the recognition that, as federal crimes are creatures of statute, the intent of Congress regarding *mens rea* governs. There, as here, however, the statute in question was silent concerning *mens rea*. The Act provided, in pertinent part, "[i]t shall be unlawful for any person . . . to *receive* or *possess* a firearm which is not registered to him in the National Firearms Registration and Transfer Record." *Id.* at 605 (emphasis added) (quoting 26 U.S.C. § 5861(d)).[1] Citing

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[1] Note the similarity between the terms "receive" and "possess" in the National Firearms Act and the terms "using" and "possessing" in 36 C.F.R. 261.16(a) under which Mr. Unser was convicted.

the traditional common law rule that offenses not requiring *mens rea* are generally disfavored,[2] this Court held that "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id.* at 606 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978); *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

The United States argued that there existed sufficient congressional intent, as demonstrated by the nature and purpose of the Act, that is, to regulate deadly weapons, to make violation of the Act a public welfare offense. This Court responded:

> [W]e have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," [citation omitted] he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute."

Id. at 607 (citation omitted). Thus, this Court clearly recognized that public welfare offenses generally involve "deleterious devices or products or obnoxious waste materials . . . that put their owners on notice that they

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[2] "[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime. . . . " *United States v. Balint*, 258 U.S. 250, 251 (1922).

stand 'in responsible relation to a public danger.' " *Id.* at 610-11 (citation omitted).[3]

Nonetheless, in *Staples*, notwithstanding the fact that the National Firearms Act dealt with "deleterious devices" that create "a public danger," this Court held that proof of Staples' *mens rea* was required for conviction. *Id.* at 619. The reason for the Court's holding was simple:

> [O]ur holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect.

Id. at 620 (citation omitted). To paraphrase the holding of the Court in *Staples* as applied to the charges facing Mr. Unser:

> [A holding that 16 U.S.C. § 551 and 36 C.F.R. 261.16(a) requires proof of *mens rea*] depends critically on our view that if Congress had intended to make outlaws of [snowmobilers] who were wholly ignorant of [their entry into a Wilderness area in the midst of a life-threatening blizzard], and to subject them to [severe penalties], it would have spoken more clearly to that effect.

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[3] *See also United States v. Freed*, 401 U.S. 601 (1971), in which this Court, in finding a public welfare offense, noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609. The same may not be said of snowmobiles.

The decision of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the decision of this Court in *Staples*, and this Court should grant this petition to resolve this conflict.

B. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Supreme Court In *Liparota v. United States*.

1. The Decision Of The Tenth Circuit Concedes That It Is In Conflict With *Liparota v. United States*.

In accord with this Court's holding in *Liparota v. United States*, 471 U.S. 419 (1985), the Tenth Circuit supplemented the test for a public welfare offense with the requirement that the regulated conduct "seriously threaten a community's health or safety." *Id.* at 433. However, the Tenth Circuit and the United States readily admit that the conduct regulated by 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) does not "seriously threaten a community's health or safety." "The government contends, and we agree, that the regulation at issue here satisfies most of these criteria, conceding however that the conduct in question does not seem to seriously threaten a community's health or safety." *United States v. Unser*, 165 F.3d 755, 762-63 (10th Cir. 1999) (App. 17). The recognition by the Tenth Circuit that it has failed to comply with *Liparota* places the Tenth Circuit in true, direct, intolerable, and irreconcilable conflict with this Court. This Court should grant this petition to resolve this conflict.

2. The Decision Of The Tenth Circuit Conflicts With *Liparota v. United States* Because It Criminalizes A Broad Range Of Innocent Conduct.

In *Liparota*, this Court found *mens rea* to be required for conviction of food stamp fraud under 7 U.S.C. § 2024(b)(1) despite the claim of the United States that the statute was subject to the public welfare offense exception to traditional *mens rea* requirements. *Liparota v. United States*, 471 U.S. 419 (1985). In so holding, this Court relied heavily on the rationale that, if the statute did not include a *mens rea* element, "a broad range of apparently innocent conduct" would be criminalized. *Id.* at 426. This Court noted that reading a *mens rea* requirement out of the food stamp statute would "render criminal a nonrecipient of food stamps who 'possessed' stamps because he was mistakenly sent them through the mail." *Id.* at 426-27. Contrary to the holding of this Court in *Liparota*, the Tenth Circuit's decision upholding Mr. Unser's conviction criminalizes "a broad range of . . . innocent conduct."[4] *Id.* at 426.

If two snowmobilers may be held strictly liable for being caught up in a dangerous and deadly blizzard, becoming disoriented and lost, and as result of accident, necessity, or emergency, finding themselves in a federal

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[4] 36 C.F.R. § 261.16(a) prohibits possession or use of "motorized equipment" in a national forest wilderness. "Motorized equipment" is defined in 36 C.F.R. § 261.2 as "any machine activated by a nonliving power source except small battery-powered handcarried devices such as flashlights, shavers, Geiger counters, and cameras."

wilderness area, who else may be prosecuted under 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a)? Without a *mens rea* requirement, anyone who, for any reason, crosses the often invisible boundary that separates a multiple use forest from a federal wilderness area could be held strictly liable for possession of "motorized equipment."[5] For example, a parent and child hiking in a national forest stray unknowingly into a wilderness area. The parent is carrying a camping stove[6] and the child is playing with a rubberband-powered, balsa wood plane;[7] both would be violating 16 U.S.C. § 551 and 36 C.F.R. 261.16(a). A woman hiker who accidentally enters a wilderness area carrying an otherwise legal, high-powered pistol for protection against grizzly bears would suddenly face conviction under 16 U.S.C. § 551 and 36 C.F.R.

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[5] In the event that the following scenarios appear unlikely, note that, on April 13, 1998, the U.S. Forest Service banned climbing safety anchors, small, piton-like devices, in federal wilderness areas. The Forest Service asserted that it had the authority to ban the anchors, which had been legal in wilderness areas since 1964, under the 16 U.S.C. § 1133(c) bar against "structures or installations." Previously, "installations" had been defined to include roads, dams, aircraft landing strips, bridges, livestock corrals, and cabins. The Forest Service also claimed that climbing anchors are contrary to the "spirit" of the Wilderness Act.

[6] The pressurized gas, a "non-living power source," activates this machine. Thus, while it could be possessed legally in a national forest unless specifically prohibited by order, it constitutes prohibited "motorized equipment" for the purposes of 36 C.F.R. § 261.2.

[7] The rubberband plane, a favorite children's toy, may certainly be deemed a piece of motorized equipment under 36 C.F.R. § 261.2.

§ 261.16(a) for possession of "motorized equipment."[8] The decision of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the decision of this Court in *Liparota*, and this Court should grant this petition to resolve this conflict.

II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND THE CONSTITUTION OF THE UNITED STATES, THE HOLDINGS OF THIS COURT, AND THE HOLDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Tenth Circuit held that the burden of proof of the necessity defense was placed properly on Mr. Unser by the District Court. *United States v. Unser*, 165 F.3d 755, 764-65 (10th Cir. 1999) (App. 21-App. 22). This holding rests entirely on the District Court's ruling that conviction for violation of 36 C.F.R. § 261.16(a) does not require proof of *mens rea*. *Id*. The Tenth Circuit stated:

> The Constitution *permits* allocation of the burden of proof to the defendant with respect to a defense which does not negate an element of the crime. [citation omitted] Therefore, because we have affirmed the district court's ruling that the offense charged may be proven without proof that defendant intended to take his motor vehicle into the protected area, or even knew that he had done so, the trial judge's ruling on the

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[8] The "nonliving power source" in this case is the chemical reaction that propels the bullet from the pistol.

> burden of proof on the necessity defense did not deny defendant any basic right.

Id. Therefore, the District Court's holding that 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) do not contain a *mens rea* requirement resulted in a holding by the Tenth Circuit that the burden of proof was shifted properly to Mr. Unser.

A. The Decision Of The Tenth Circuit Conflicts With The Fifth Amendment To The United States Constitution And The Decision Of This Court In *Patterson v. New York.*

As the Tenth Circuit stated in its opinion, "It is well settled . . . that the defendant at least must bear the initial burden of producing evidence which could support a finding in his favor on each element of the defense." *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999) (App. 21-App. 22). No question exists that Mr. Unser met this initial burden of production. *Id.* It is equally well settled that the government bears the burden of proof beyond a reasonable doubt of each element of a criminal offense. *In re Winship*, 397 U.S. 358 (1970). "[T]he requirement of proof beyond a reasonable doubt in a criminal case is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan J. concurring).

However, in some instances, the burden of proof of a defense may be shifted to the defendant, but this shifting may occur only if that defense does not negate an element of the crime. *Patterson v. New York*, 432 U.S. 197 (1977). In *Patterson*, this Court permitted the burden of

proof to be shifted only because there existed a statute permitting the shift. *Id.* at 204-208 (*see also, e.g., Jacobson v. United States*, 503 U.S. 540 (1992), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). As no burden shifting statute exists in this case, the Tenth Circuit's decision to shift the burden of proof to Mr. Unser creates a true, direct, intolerable, and irreconcilable conflict with *Patterson* and other decisions of this Court and, thereby, with the Fifth Amendment to the United States Constitution. This Court should grant this petition to resolve this conflict.

B. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Court Of Appeals For The Seventh Circuit In *United States v. Talbott.*

In *United States v. Talbott*, 78 F.3d 1183 (7th Cir. 1996), the court held:

> Nevertheless, the fact that the Constitution allows Congress . . . to enact laws allocating to criminal defendants the burden of proving affirmative defenses does not mean that, absent a statute actually doing so, the burden shifts automatically. In other words, *though it may be Constitutionally permissible to enact a burden-shifting statute, some affirmative legislative action must trigger that shift.* [citation omitted] *Absent such a statute, the burden of proof remains on the government to negate beyond a reasonable doubt the affirmative defense properly raised by the defendant.*

Id. at 1186 (emphasis added).

Under *Talbott*, only statutory authority, not the amorphous "pragmatic" concerns referred to by the Tenth

Circuit, may serve as the basis for the burden shifting that occurred with regard to Mr. Unser.[9] No statute authorizing shifting the burden of proof of the necessity defense to Mr. Unser was cited by the Tenth Circuit because none exists. Thus, the decision of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the decision of the United States Court of Appeals for the Seventh Circuit. This Court should grant this petition to resolve this conflict.

III. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE TENTH CIRCUIT AND DECISIONS RENDERED BY OTHER FEDERAL COURTS OF APPEALS.

A. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Court Of Appeals For The Ninth Circuit In *United States v. Semenza.*

The decision of the Tenth Circuit upholding Mr. Unser's conviction for violation of 36 C.F.R. § 261.16(a), which was promulgated pursuant to 16 U.S.C. § 551, depends entirely on the Tenth Circuit's holding that violation of 36 C.F.R. § 261.16(a) constitutes a "public welfare

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[9] Citing the "pragmatic element" that defendants in cases such as this may have superior, if not singular, access to the facts necessary to prove or disprove a defense, the Tenth Circuit held that shifting the burden of proof of the necessity defense to Mr. Unser did not violate his Fifth Amendment Due Process rights. *United States v. Unser*, 165 F.3d 755, 764-65 (10th Cir. 1999) (App. 22-App. 23).

offense" and therefore requires no *mens rea*.[10] The decision of the Tenth Circuit conflicts with the decision of the Ninth Circuit in *United States v. Semenza*, 835 F.2d 223 (9th Cir. 1987), where nearly identical regulations were held not to define public welfare offenses and therefore not to dispense with a *mens rea* requirement.

Semenza appealed his conviction under 36 C.F.R. § 261.7(a) for "[p]lacing or allowing unauthorized livestock to enter or be in the National Forest System or other lands under Forest Service control." As in the instant case, this regulation was promulgated pursuant to 16 U.S.C. § 551, and there, as here, the United States argued that violation of the regulation was a strict liability offense. The Ninth Circuit disagreed and reversed the decision with the holding that a scienter requirement existed under 36 C.F.R. § 261.7(a). "The Government must prove that the defendant willfully acted to allow his cattle to enter the National Forest, or willfully failed to prevent their entering when he had a clear opportunity to do so." *Semenza* at 225.

The decision of the Ninth Circuit in *Semenza* was based almost entirely on a lack, in 16 U.S.C. § 551, of legislative intent to dispense with *mens rea*. "Absent a clear indication of legislative intent, courts should be reluctant to dispense with mens rea." *Semenza* at 224. The

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[10] As the Tenth Circuit notes in its opinion, the modern definition of a public welfare offense originated in *Morissette v. United States*, 342 U.S. 246 (1952), which followed, *inter alia*, *United States v. Balint*, 258 U.S. 250 (1922).

Ninth Circuit held that the terms "allowing" and "permitting" as used in 36 C.F.R. § 261.7(a) did not indicate an intention to impose strict liability.[11]

In this case, the only possible indicia of congressional intent with regard to the application of 16 U.S.C. § 551 to 16 U.S.C. § 1133 is the exception contained in 16 U.S.C. § 1133(c), which provides that "measures required in emergencies involving the health and safety of persons within the area [are excepted from the prohibition against the] use of motor vehicles, [or] motorized equipment. . . . " In enacting the emergency provision of 16 U.S.C. § 1133(c), Congress recognized that circumstances could exist, like those facing Mr. Unser and Mr. Gayton, under which the use of motor vehicles or motorized equipment in a wilderness area would occur. This exception, therefore, demonstrates the intent of Congress that 16 U.S.C. § 551 is not a strict liability offense. The decision of the Tenth Circuit is in true, direct, intolerable, and irreconcilable conflict with the decision of the United States Court of Appeals for the Ninth Circuit. This Court should grant this petition to resolve this conflict.

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[11] Of course, only Congress may create a strict liability or public welfare offense. Thus, the question is not, what did the Forest Service intend with the adoption of 36 C.F.R. § 261.16(a), but what did Congress intend with the enactment of 16 U.S.C. § 551.

B. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Court Of Appeals For The Ninth Circuit In *United States v. Launder.*

The decision of the Tenth Circuit conflicts with the decision of the Ninth Circuit in *United States v. Launder*, 743 F.2d 686 (9th Cir. 1984). Launder was convicted in the United States District Court for the District of Arizona of violating 18 U.S.C. § 1856, which prohibits anyone from starting a fire in or near a national forest and then failing to extinguish it entirely. The statute further subjects anyone who "permits or suffers said fire to burn or spread beyond his control" to fines and/or imprisonment. *Id.*

In declaring that 18 U.S.C. § 1585 contains a *mens rea* requirement, the Ninth Circuit held that, under *Morissette v. United States*, 342 U.S. 246 (1952), "strict liability criminal statutes remain the exception in our criminal law system, not the rule." *Launder* at 690. As in *Semenza*, the Court looked to legislative intent to determine whether Congress intended to make these crimes strict liability offenses. The Court held that Congress' use of the words "permits" and "suffers" demonstrated a lack of congressional intent to create a strict liability offense.

> In including the terms "permits" and "suffers" in Section 1856 Congress evidenced its intention that a defendant not be found culpable under the statute unless the government has shown a willingness on his part to allow the fire to burn beyond control, or at the least that he failed to make all reasonable efforts to extinguish the fire.

Id. at 689.

As *Semenza* and *Launder* demonstrate, the Ninth Circuit has required *mens rea* for conviction under both 16 U.S.C. § 551 and 18 U.S.C. § 1585. The Tenth Circuit's decision in this case, therefore, is in true, direct, intolerable, and irreconcilable conflict with the decisions of the Ninth Circuit. This Court should grant this petition to resolve this conflict.

C. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Court Of Appeals For The Fourth Circuit In *United States v. Wilson.*

The decision of the Tenth Circuit also conflicts with the decision of the Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). In *Wilson*, the Fourth Circuit, over the objections of the United States, construed the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), which provides, in pertinent part that "[a]ny person who knowingly violates section 1311" commits a felony, to require *mens rea*:

> [W]e hold that the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), requires the government to prove the defendant's knowledge of *facts* meeting each essential element of the substantive offense . . . but need not prove that the defendant knew his conduct to be illegal.

Id. at 262 (emphasis in original) (citations omitted).

The Fourth Circuit clarified its holding by way of analogy:

> Thus, if a defendant thought he was discharging water when he was in fact discharging gasoline,

> he would not be guilty of knowingly violating the act which prohibits the discharge of pollutants.

Id.

Consistent with the *Wilson* holding, if Mr. Unser did not know that he had entered a wilderness area with his snowmobile or lacked the intent to enter the wilderness area due to emergency or necessity, he could not be convicted for want of *mens rea*. As a result, the holding of the Tenth Circuit that Mr. Unser's intent was irrelevant because no *mens rea* is required creates a true, direct, intolerable, and irreconcilable conflict with the holding of the Fourth Circuit in *Wilson*. This Court should grant this petition to resolve this conflict.

D. The Decision Of The Tenth Circuit Conflicts With The Decision Rendered By The United States Court Of Appeals For The Eighth Circuit In *Holdridge v. United States*.

The Eighth Circuit formulated the following test for public welfare offenses.

> [1] [W]here a federal criminal statute omits mention of intent *and* [2] where it seems to involve what is basically a matter of policy, [3] where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, [4] where the penalty is relatively small, [5] where conviction does not gravely besmirch, [6] where the statutory crime is not one taken over from the common law, *and* [7] where congressional purpose is supporting, the statute can be construed as one

> not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (emphasis added). The Tenth Circuit expressly relied upon this definition of a public welfare offense in upholding Mr. Unser's conviction. *United States v. Unser*, 165 F.3d 755, 762 (10th Cir. 1999) (App. 17).

The Tenth Circuit's application of *Holdridge* is fatally flawed. To begin, the *Holdridge* test is conjunctive.[12] The *Holdridge* court held that the crime at issue was a public welfare offense only after finding that "[a]ll the standards of the . . . [test] are met." *Holdridge* at 310. Thus, a federal criminal statute must meet all the elements of the *Holdridge* test for that statute to qualify as a public welfare offense for which no *mens rea* is required. The Tenth Circuit erred in holding that the *Holdridge* test was met.

First, the finding by the Tenth Circuit that the penalties involved under 36 C.F.R. § 261.16(a), that is, up to a $5,000 fine and/or imprisonment for up to six months, are "relatively small" is clearly erroneous. Perhaps the Tenth Circuit focused on the penalty assessed Mr. Unser ($75). However, it should have determined whether $5,000 and/or imprisonment for up to six months is "relatively small." While these penalties are "relatively small" when measured against life imprisonment or the death penalty, what penalties would not be considered relatively small in those contexts? For the vast majority of

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[12] Note the two uses of the word "and;" specifically note the placement of the second "and" where it can only logically be read as requiring that all of the elements of the test be met.

Americans, $5,000 is a great deal of money, and the prospect of spending one day in prison, let alone six months, is terrifying, as it is meant to be. The Tenth Circuit's finding that this element of the *Holdridge* test was met is clearly in error.

Second, the Tenth Circuit incorrectly decided that the *Holdridge* test's requirement that "the statutory crime is not one taken over from the common law" was met. *Id.* 16 U.S.C. § 551 provides the statutory authority for 36 C.F.R. § 261.16(a). 16 U.S.C. § 551 provides, in pertinent part, "[t]he Secretary of Agriculture shall . . . make such rules and regulations . . . to regulate [the National Forests]—occupancy and use. . . . " This statute authorizes the Secretary of Agriculture to regulate the "use and occupancy" of land owned by the United States, including national forests. Thus, violation of 16 U.S.C. § 551 is analogous to the common law crime of trespass. Therefore, Mr. Unser was charged effectively with a form of the common law crime of trespass as codified by 16 U.S.C. § 551. The fact that Mr. Unser was charged with violation of this statute based primarily and necessarily on the finding that he had entered the wilderness area supports this interpretation of 16 U.S.C. § 551. The Tenth Circuit's finding that this element of the *Holdridge* test was met is clearly in error.

Third, under the *Holdridge* test, an offense may be a public welfare offense only "where congressional purpose is supporting." Yet, in this case, there is absolutely no intent by Congress to create a strict liability offense by adoption of 16 U.S.C. § 551. The only evidence on this issue exists with regard to the emergency exception adopted by Congress and discussed *supra* at 22. As to the

interpretation placed on this statute by the Forest Service, that interpretation indicates the view of the Forest Service that *mens rea* is required for conviction under 36 C.F.R. § 261.16(a).[13] The Tenth Circuit's finding that there exists congressional support for its view that *mens rea* is not required under 16 U.S.C. § 551 is clearly erroneous, and thus another element of the *Holdridge* test is lacking.

Fourth, under the *Holdridge* test, an offense may be a public welfare offense only "where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person." *Holdridge* at 310. This test must be applied "under the circumstances" that existed for Mr. Unser and Mr. Gayton. They were caught in a brutal, life-threatening blizzard. Tearing wind and blinding snow surrounded them, obscuring their vision and obliterating Mr. Unser's ability to navigate. Under these extreme and dangerous "circumstances," the requirement that Mr. Unser not enter the wilderness area on his snowmobile is neither "reasonable," nor is "adherence thereto properly expected of a person." The Tenth Circuit's finding that this element of the *Holdridge* test was met is clearly erroneous.

Fifth and finally, the Tenth Circuit erred in finding that "conviction [under 16 U.S.C. § 551 and 36 C.F.R.

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[13] A February 16, 1994, proposal to amend 36 C.F.R. §§ 261 and 262 states, in pertinent part, "A new paragraph (d) would be added to clarify that unless intent is stated in specific provision, strict liability applies to these regulations." 59 *Fed. Reg.* 7880, 81 (proposed February 16, 1994). The fact that paragraph (d) was never promulgated as a final rule proves that the Department of Agriculture recognized that the rule was contrary to the intent of Congress and thus rejected it.

§ 261.16(a)] does not gravely besmirch" Mr. Unser's reputation. Today, crimes against the environment carry with them a heavy stigma indeed. Even before conviction, Mr. Unser was dubbed an environmental criminal and much worse in the press.[14] The Tenth Circuit has absolutely no basis for holding that conviction of this crime did not "gravely besmirch" Mr. Unser's reputation, and thus another element of the *Holdridge* test is lacking.

As a result, the holding of the Tenth Circuit that the elements of the *Holdridge* test were met is not only clearly erroneous, but also creates a true, direct, intolerable, and irreconcilable conflict with the holding of the Eighth Circuit in *Holdridge*. This Court should grant this petition to resolve this conflict.

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[14] "He can appeal till the cows come home, but Unser must never be allowed to outrace the long arm of the law." *Unser Gets the Brakes*, Denver Post, June 16, 1997. "Bobby Unser's recent snowmobile foray into the South San Juan Wilderness Area is yet another example of *the blatant disregard of our laws*. . . . Shame on members of Congress for siding with *lawbreaker Unser*." *Unser No Hero*, Denver Post, April 17, 1997 (emphasis added). "The time has come for Bobby Unser to act like the champion he once was and not like *the spoiled brat he has apparently become*." *Act Like a Champ*, Denver Post, April 6, 1997 (emphasis added).

CONCLUSION

For all of the above reasons, this Court should grant the petition of the Defendant, Mr. Robert W. "Bobby" Unser, in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: April 2, 1999

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 97-1241
ROBERT W. UNSER, Defendant-Appellant.	)	(Filed Jan. 4, 1999)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 97-CR-110-B)

Todd S. Welch (Bobac A. Barjesteh and William Perry Pendley, with him on the brief) of Mountain States Legal Foundation, Denver, Colorado, for Defendant-Appellant.

Stacey Goh, Assistant U.S. Attorney (Henry L. Solano, United States Attorney, with her on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before **PORFILIO, HOLLOWAY** AND **TACHA**, Circuit Judges.

HOLLOWAY, Circuit Judge.

Mr. Unser brings this timely, direct appeal from his conviction for unlawful possession and operation of a motor vehicle within a National Forest Wilderness Area

in violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a). The maximum penalty for this conduct is a sentence of up to six months of imprisonment, a fine of up to $5,000, or both. 16 U.S.C. § 551 (setting out length of imprisonment authorized and maximum fine of $500); 18 U.S.C. § 3571(b)(6) (raising maximum fine to $5,000). The crime charged is a Class B misdemeanor (because the maximum authorized punishment is more than thirty days but no more than six months, 18 U.S.C. § 3559(a)(7)) and a "petty offense," a category which includes misdemeanors of Classes B and C, plus "infractions," 18 U.S.C. § 19.[1] After a two-day trial to the court, Unser was convicted and was sentenced to pay a fine of $75.

This case arises from a story of survival in the wilderness under extreme conditions and involves legal issues requiring examination of some of the most fundamental concepts in criminal law. Like the parties obviously do, we view the case as having significance beyond the penalty actually imposed.

I

A

We will begin with an overview of the facts. Our summary in this part of the opinion is based on the testimony of the defendant, who was the only witness at

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[1] The significance of the petty offense category is that less stringent procedural rights are accorded to the accused who faces only charges of this type. *See* Fed. R. Crim. P. 58. Thus, most significantly, the accused does not have a right to a jury trial. Fed. R. Crim. P. 58(b)(2)(F).

trial to have been present during the primary events. Much of this evidence was undisputed; we will note later in the opinion the critical areas which are in dispute.

On Friday, December 20, 1996, Mr. Unser set off to go snowmobiling with a friend, Robert Gayton. Unser, who lives in Albuquerque and has a ranch near Chama in far northern New Mexico, was very experienced with snowmobiles and fairly familiar with the place he chose for them to ride. Gayton had never been on a snowmobile before, and so took a few minutes to practice on the snowmobile at Unser's ranch. The two then loaded two snowmobiles onto a trailer and made a short drive on state highways across the state line into far southern Colorado, high in the San Juan Range of the Rocky Mountains near La Manga Pass.

They parked at the Red Lake Trail parking lot on state highway 17. From there, Unser planned a fairly short ride to the Jarosa Peak area of the Rio Grande National Forest. Unser planned on a fairly short ride for several reasons. It was already midday when they reached the parking lot to begin riding, and of course nightfall would come early at that time of the year. While Unser was a very experienced rider, he had only recently recovered from back surgery, and his companion, as we have noted, was a beginner.

Gayton rode around a few minutes in the immediate area of the parking lot to get more familiar with the machine and to riding in the deeper snow at the higher elevation near the pass. The two then set off for the Jarosa Peak area. The area around this peak includes a mesa, sometimes referred to as Jarosa Mesa, which was a climb

of a few hundred feet from the parking lot. Unser said he chose this place because it was a fairly short and easy, yet interesting, ride for the beginner, Gayton.

The weather was clear at first, but when the two men reached the mesa, Unser testified, a "ground blizzard" came up rather suddenly. A ground blizzard was described as the result of high winds blowing substantial amounts of fallen snow; these conditions may arise when no new snow is falling. Visibility was near zero. Unser's machine started having problems (the engine died repeatedly for the rest of the ill fated ride), and the situation became dangerous. The two men got lost trying to find their way back to the truck. Then, Gayton went off into a small ravine and his machine was stuck. They abandoned it and rode on. As they did, they were continually having to work on Unser's machine to get it restarted. Eventually, it failed completely. The men started walking but were still lost when night came. They dug a snow cave and spent the night in it. The next day they continued their wanderings on foot, suffering greatly. They hiked through the day and night until some time after midnight when they came upon a barn equipped with a telephone. They were soon rescued. They were treated at a local hospital for frostbite, dehydration and exhaustion.

B

We will now review other evidence presented at trial. While Mr. Unser and Mr. Gayton were lost in the rugged terrain of the National Forest battling the extreme cold and other adverse elements, friends and family were aware that they had not returned on Friday evening. On

Saturday December 21 a search and rescue operation was organized. Some friends of Unser went up from Chama to the parking lot where his truck had been noticed. On arriving there, they were told by a local deputy sheriff that they would have to wait for the authorized search and rescue team from Colorado to arrive, which they did. Eventually, six to eight people went out from the trail head on snowmobiles looking for Unser and Gayton. The rescuers did not actually get out on the mountain until mid-afternoon, and so had only a couple of hours before nightfall. In that time they found the snowmobile that Gayton had been riding, but were unable to find enough tracks to determine which way the two men had gone from there.

At trial four witnesses who had participated in the search and rescue operation testified. Only one of these witnesses, Richard Martin, was called by the government. Martin is a resident of southern Colorado and a veteran of a number of similar rescue efforts. Martin testified that the conditions were not bad on December 21 as the group began their search. The men were able to find tracks and, at least at first, to follow the path that Unser and Gayton had made the previous day. From the tracks, it appeared that Unser had started out from the parking lot on a fairly well defined trail, one which had in years past been used by cattlemen taking stock up to summer pastures. (We note at this point that all the witnesses at trial agreed that Unser's ill fated ride had begun along this route, but opinions were divided on where he might have gone after the first five or six miles.) That trail led up to what the witnesses referred to as Jarosa Mesa (but it is not clear from the record just how far this area goes). Conditions

up on the mesa were very bad, as visibility was greatly reduced by blowing snow.

Martin testified that he found tracks on the mesa which appeared to have been made when Unser and Gayton were merely riding for fun; at the judge's suggestion, he marked "PT" on the enlarged map exhibit to show the area where he had found these "play tracks." The rescuers attempted to follow Unser's tracks from there, but tracking became very difficult because so many of the tracks had been erased by blowing snow by that time. Eventually, Martin found the snowmobile that Gayton had been riding. Martin testified that the tracks he had been following just before he found this first snowmobile indicated to him that the riders were lost and trying to find their way. The rescue team extricated the abandoned snow mobile and rode on, dividing into two groups. At nightfall, they suspended their efforts for the day.

Martin marked on the map for the court the point where he estimated that the first snow mobile had been found and made a line to show the route he believed he had taken to this point. The route as drawn by Martin proceeds for slightly over three miles in a northwesterly direction, almost in a straight line from the point where Martin had marked "play tracks" on the map, and ends about two miles past the boundary of the wilderness area. This testimony was later cited by the trial judge as the most credible and consistent evidence as to the location of the first machine, an issue of fact which was of considerable significance because of other findings by the judge, as we shall see.

It is worth noting that Martin's testimony was far from precise. Martin was candid in describing his effort as being less than certain, twice describing it as a guess. When the rescuers split into groups after having found the first abandoned snowmobile, Martin had ridden to Red Lake, which was northeast of the point he marked on the map as the likely location of the first machine. Martin testified that his estimate of the location of the snowmobile was based in part on his belief that he had been going northeast from that point to Red Lake during the rescue efforts.

Martin had gone back to the area only a few days before trial in the company of Forest Service Agent Burd, among others, to see if he could retrace the path he had taken during the rescue effort. Martin testified that they were very careful to stay out of the Wilderness Area and stopped before reaching the place where Martin believed the first snow mobile had been found. (Although it was June when this effort was made, they were on snowmobiles.) As the defense has emphasized, both at trial and on appeal, Martin said that the odometer on his snowmobile read 7.2 miles when he turned back at a point he (or others with him) estimated to have been about a quarter of a mile short of the wilderness boundary.[2] Martin also testified that during this second visit to the area he tested his sense of direction and found that he was off by eighty

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[2] It is interesting to note that on this second visit to the area, Mr. Martin had the advantage of much better weather conditions and the assistance of maps and guidance from the Forest Service. Even so, he was uncertain just where the wilderness boundary was and said that he had never seen signs in this area marking the boundary.

degrees. He was not asked to explain whether he had accounted for this when he testified that he believed that the first snowmobile had been found southwest of Red Lake.

C

About three weeks after this adventure, Unser contacted officials with the Forest Service's office in Albuquerque for assistance in finding the second snowmobile. Unser met with Ben Tafoya, a Forest Service Agent, on January 7, 1997, in Albuquerque. Because he had been told that he might need a permit to retrieve the machine, Unser brought with him a friend, Gabe Valdez, and Manny Martinez. Before retiring, Manny Martinez had been a supervisor in the law enforcement unit of the Forest Service and indeed had formerly been Tafoya's immediate supervisor. These men met and went over maps trying to determine where the machine might have been abandoned, but they believed that they had accomplished little. Further efforts were planned for the next day.

Tafoya told Unser that he would contact officials with the Colorado offices of the Forest Service who would be more familiar with the area and of more assistance. When Tafoya first contacted officials in Colorado, he asked to speak to Chris Ortiz, the law enforcement officer for that area. Ortiz told Tafoya that he should speak with Brenda Schultz or Charlie Burd, who were investigating the incident for possible violation of the ban on use of motor vehicles in a wilderness area, having determined that

Unser probably had entered the South San Juan Wilderness Area of the Rio Grande National Forest. Those two agents, Burd and Schultz, arranged to come to meet with Unser at Tafoya's office the following day. Tafoya was asked not to tell Unser that these officers wanted to talk to him as part of their criminal investigation. Instead, Tafoya merely told Unser that two agents were coming down from Colorado who could help him locate and retrieve his snowmobile.

Charlie Burd, special agent with the Forest Service, testified that he, along with Brenda Schultz, met with Unser the next day for about three and a half hours in a conference room near Tafoya's office in Albuquerque. Unser came by himself to this meeting. Burd indicated that Unser was mostly cooperative during this meeting, but Burd suggested that Unser was less than candid at times in saying that he had no idea which way he had gone after leaving Jarosa Mesa. After lengthy and not very productive discussions, Burd asked Unser to draw a sketch of the valley where the second machine had been abandoned. From this sketch, Burd testified he was able to recognize the area. Burd then showed Unser an aerial photograph, using a stereoscopic device to give the photo a three dimensional effect. Unser immediately recognized the photograph Burd had selected. Six months later, just the week before trial, Burd located the second machine, still stuck in the snow, very near the place that he and Unser had identified in the January meeting. Burd marked that point on the topographical map that Martinez had used in his testimony, government's exhibit 3. The point is almost due east of the point identified by

Martinez as the most likely location of the recovery of the first machine.

Burd testified that Unser never indicated to him that he had any concern for his safety until the second snowmobile failed. Unser had said that he had been in this area about ten times before, but that he was unsure just where they had gone because he simply had not been paying attention while he was enjoying the sport. According to Burd's testimony, Unser told him that after the first machine got stuck, with the weather beginning to be bad, Unser decided to try to head straight back to the parking lot, rather than to return by retracing their path. Unser had told Tafoya that at that point he started following the "windrows." Windrows are wave like patterns in the snow which, Tafoya testified, would generally run east to west in this area.

D

As for the defense evidence, for purposes of our review we need not go into any detail. The trial judge clearly did not find much of the defendant's evidence on critical issues to be credible. It is sufficient to note that two members of the rescue team attempted to locate on the map the point where they thought the first snowmobile had been recovered, and like defendant in his testimony, both fixed this point as being outside the wilderness area, before Unser and Gayton would have reached the wilderness boundary. Matthew Martinez testified that he was among those who went back to the area on Sunday, December 22, after Unser and Gayton had been rescued, to retrieve the first snowmobile. He said

that the snowmobile's odometer showed eight miles plus some tenths. Several witnesses agreed that a snowmobile's odometer usually shows more miles than has actually been traveled. This is because the odometer registers revolutions of the track, which often slips especially when the rider is attempting to climb a steep slope. Mr. Burd testified that the route apparently taken by Unser up to the top of Jarosa Mesa was so steep that when he made the climb himself he thought at first that his machine would not be able to do it.

II

On appeal from a criminal conviction, of course, we view the evidence in the light most favorable to the prosecution. In the instant case, where the trial judge found the facts specially, even though not requested to do so,[3] the findings may not be disturbed unless clearly erroneous. *Campbell v. United States*, 373 U.S. 487, 493 (1963).

We will summarize the district judge's findings as a prelude to our analysis of the legal issues raised by Mr. Unser. Although there is essentially no dispute as to the main events as described by Unser and as we have just summarized, there certainly was dispute about important details. The trial judge did not credit Unser's testimony in its entirety. In particular, the judge found that the two

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[3] In the trial of a criminal case without a jury, the judge must make a general finding and "shall in addition, on request before the general finding, find the facts specially." Fed. R. Crim. P. 23(c). The findings may be oral or may be stated in an opinion or memorandum of decision.

riders left the Jarosa Peak area before any emergency arose and that they were intentionally riding northwest, further away from where they had begun their ride, because they were still just riding for fun.

The judge found that Mr. Martin's testimony as to the location of the first snowmobile was the most credible, and he gave several reasons for this finding. The fact that the second machine was eventually recovered almost due east from where Mr. Martin fixed the location of the first machine was consistent with the Unser's statements, both in the interview with Burd and in his trial testimony, that after abandoning the first machine he and Gayton attempted to follow the windrows, which the evidence established ran west to east. The judge found that the odometer reading on the first machine, when it was recovered, was a little over eight miles. The judge then said that he had used a piece of wire to determine the distance to the spot on the map marked by Mr. Martin, following the route Martin had said that rescuers had used in following the tracks left by Unser and Gayton. From this examination of the evidence, the judge determined that it was about 4.2 miles from the parking lot to the place which Martin had estimated to be the location of the abandoned first snowmobile. (In fact, the judge misread the scale of the map; the distance is twice what he found it to be. This is clear because he made findings about other points on the map, each of which is plainly based on the same erroneous reading of the scale of miles.)

The judge then proceeded to consider Unser's contention that if he had entered the wilderness area with a snowmobile, he had done so only under a life-threatening

emergency. The judge had held before trial that Unser would have the burden of proving this defense by a preponderance of the evidence. This conclusion was based on another holding made before trial, *i.e.*, that the offense charged was a strict liability offense and accordingly the government would not have to prove any intent to snowmobile in the wilderness area, nor would the government have to prove that Unser knew that he had entered a wilderness area. The judge stated, "[T]he law ought to afford, and I believe does, a measure of defense to the citation issued here based upon emergency and defenses otherwise known essentially as a necessity defense, sometimes called a choice of evils defense." II App. at 687.

Accordingly, in the judge's view it was critical to determine whether emergency conditions had arisen before or after Unser had entered the wilderness area. The judge specifically found that an emergency did not arise until "either just before or just after Mr. Gayton's machine got stuck." II App. at 689. Based on his finding that the more credible evidence was that the first machine had been found inside the wilderness boundary, the judge concluded and held that the defense had failed to carry the burden of establishing the necessity defense, and pronounced the defendant guilty.

This appeal followed. The major contentions of defendant Unser on appeal are: (1) the district judge erred by holding that the offense of violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.16(a) of possessing and using a motor vehicle in a Wilderness Area contains no *mens rea* requirement; (2) the judge erred by denying defendant Unser the necessity defense in the emergency conditions

that confronted Unser and his companion; and (3) the judge erred in denying defendant Unser's motion to suppress his statement based on the involuntariness of the statement and violation of his rights under the *Miranda* doctrine.

We will analyze these issues in turn.

III

First, we address the *mens rea* issue:

"Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). Our task is to determine, as best we can, the intent of Congress in empowering the Secretary of Agriculture to adopt regulations applicable to National Forest lands and enforceable by criminal penalties. Then, having found that intent, we must determine whether the intent is compatible with due process. Unfortunately, we find little direct guidance in the language Congress used.[4] The

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[4] 16 U.S.C. § 551 provides, in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section . . . or such rules and regulations shall be punished by a fine of

regulation promulgated by the Secretary of Agriculture likewise reveals little on this question.[5] However, while the statute and regulation involved here do not contain a *mens rea* element, "silence on this point by itself does not necessarily suggest that the [legislators] intended to dispense with a conventional *mens rea* element." *Staples v. United States*, 511 U.S. 600, 605 (1994); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *United States v. Martinez-Morel*, 118 F.3d 710, 716 (10th Cir. 1997).

Morissette also noted, however, that the general presumption that some guilty purpose is required is not applicable to what have been termed public welfare offenses, which typically impose penalties to serve as an effective means of regulation. The Court's observations about the nature of such public welfare offenses provide a helpful starting point for our analysis:

> not more than $500 or imprisonment for not more than six months, or both.

As noted earlier, Congress changed the maximum fine from $500 to $5,000 in 1987. *See* 18 U.S.C. § 3571(b)(6). Thus, at the time of this offense in 1996, the maximum penalties to which Mr. Unser could have been sentenced were a fine of not more than $5,000, or imprisonment for not more than six months, or both.

[5] The regulation under which Mr. Unser was prosecuted provides:

> The following are prohibited in a National Forest Wilderness:
>
> (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation.

36 C.F.R. § 261.16

> These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.

Morissette, 342 U.S. at 255-56 (emphasis added).

Following *Morissette*, the Eighth Circuit has stated that

> where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where the conviction does not gravely besmirch [the reputation], where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (Blackmun, J.); *see also Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991). Additionally, the Supreme Court has indicated that most public welfare offenses involve situations where a reasonable person should know that the conduct is subject to stringent regulation and may seriously threaten a community's health or safety. *Liparota v. United States*, 471 U.S. 419, 433 (1985).

The government contends, and we agree, that the regulation at issue here satisfies most of these criteria, conceding however that the conduct in question does not seem to seriously threaten a community's health or safety. The government states: "Admittedly, it is difficult [to] characterize the use of motorized vehicles in a wilderness area as conduct 'that may seriously threaten a community's health or safety.' " Brief of Appellee at 14 (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985)). Nevertheless, we are persuaded that 16 U.S.C. § 551 and 36

C.F.R. § 261.16(a), the applicable statute and regulation involved here, do create a "public welfare offense." Indeed, several other courts have found that such Forest Service regulations define public welfare offenses. *E.g., United States v. Kent*, 945 F.2d 1441, 1446 (9th Cir. 1991) (unauthorized occupancy of National Forest land); *United States v. Larson*, 746 F.2d 455, 456 (8th Cir. 1984) (trespass by cattle); *United States v. Wilson*, 438 F.2d 525 (9th Cir. 1971) (cutting wood); *United States v. Northwest Pine Products*, 914 F. Supp. 404 (D. Ore. 1996) (timber operations); *but see United States v. Semenza*, 835 F.2d 223 (9th Cir. 1987) (mental element held implied in offense of allowing unauthorized livestock entry in National Forest); *United States v. Launder*, 743 F.2d 686 (9th Cir. 1984) (proof required of some intent or fault in permitting fire out of control in National Forest) *United States v. Osguthorpe*, 13 F. Supp.2d 1215 (D. Utah 1998) (mental element required for offense of allowing unauthorized livestock to enter National Forest).

We must decide the effect of the omission from the statute and regulation of a *mens rea* requirement. Under the proposition distilled by Justice Blackmun's *Holdridge* opinion for the Eighth Circuit from earlier cases, 242 F.2d at 310, we are persuaded that most of the conditions are met for treating the offense charged here as a public welfare offense lacking a *mens rea* requirement: there is, as noted, no mention of an intent in the statute or regulation; the duty imposed is reasonable, under the circumstances, and adherence properly expected; the statutory scheme is not one taken from the common law and congressional purpose is supportive; and conviction does not

gravely besmirch one's reputation, involving only a misdemeanor. The troublesome question remaining is whether "the penalty is relatively small." *Holdridge*, 282 F.2d at 310.

Taking into account the 1987 increase in the potential fine, the maximum penalties are a $5,000 fine, or imprisonment for not more than six months, or both. These are not *de minimis*, in our judgment, but the test is whether "the penalty is *relatively small*," as *Holdridge*, 282 F.2d at 310 (emphasis added), states. This follows the test laid down by the Supreme Court in *Morissette*, that "penalties commonly are relatively small," 342 U.S. at 256 (emphasis added), for public welfare offenses where no mention of intent is made and the guilty act alone makes out the crime. In *Staples*, the Court noted that cases that first defined the concept of public welfare offenses involved statutes that "punished only *light penalties such as fines or short jail sentences. . . .* " 511 U.S. at 616.[6] Later *Staples* referred to "*small penalties*" being attached to such public welfare offenses as logically complementing the absence of a *mens rea* requirement. *Id.* (emphasis added). We have addressed a similar issue in *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1089 (1998), in the context of Migratory Bird Treaty Act misdemeanor violations carrying a potential fine up to $5,000 or imprisonment of not more than six months,

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[6] In *Staples*, the Court cited *Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or six months in jail, or both); *Commonwealth v. Farrer*, 91 Mass. 489 (1864) (fine); and *People v. Snowburger*, 71 N.W. 497 (Mich. 1897) (fine up to $500 or incarceration in county jail).

or both. *See* 16 U.S.C. § 707(a) and 18 U.S.C. § 3571(b) (raising maximum fine up to $5,000 in 1987). In *Corrow*, we joined other circuits in holding such offenses are strict liability without a scienter requirement.

This 1996 offense occurred in a time frame when heavier sentences of imprisonment and fines are more common. In light of these circumstances and the lack of besmirching an offender's reputation by a felony conviction, we are persuaded that the public welfare offense in question here was properly held by the district judge not to have a required *mens rea* element.

IV

As we have earlier noted, the district judge held that Unser could assert a common law defense of necessity, based on the life threatening situation he faced when he became lost in the extreme conditions that have been described. The judge eventually ruled, however, that Unser had not carried the burden of proving the necessity defense by a preponderance of the evidence. Unser argues on appeal that the district judge erred in holding that he had the burden of proof on the necessity defense,[7] and also argues that the evidence showed that any entry

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[7] In written submissions to the district court, the defendant twice stated that the burden of proof was on him. Nevertheless, because the district court evidently did not hold defendant to this position, but instead permitted defendant later to argue that the burden should be on the government, and because the government does not urge on appeal that this issue has been waived, we conclude that the issue has been preserved.

into the wilderness area should have been excused under the necessity defense.

We have discussed the necessity defense on several occasions. It is well settled, and not challenged here, that the defendant at least must bear the initial burden of producing evidence which could support a finding in his favor on each element of the defense. The government does not dispute that defendant met this burden of production and that the trial judge properly considered the necessity defense in this case. Various formulations of the elements of the defense may be found, but for our purposes we need only examine one such formulation. The necessity defense may excuse an otherwise unlawful act if the defendant shows that "(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm." *United States v. Meraz-Valeta*, 26 F.3d 992, 995 (10th Cir. 1994) (citing *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982) (en banc)).

The district court's holding that the burden of proof on the defense of necessity was on the defendant was expressly based on the prior ruling that the offense charged did not include a *mens rea* element. I App. at 119-20 (citing *United States v. Toney*, 27 F.3d 1245 (7th Cir. 1994)); II App. at 687. The trial judge recognized the fundamental principle that the government must bear the burden of proof beyond a reasonable doubt of each element of a criminal offense. *In re Winship*, 397 U.S. 358 (1970). It follows from this that when evidence has been produced of a defense which, if accepted by the trier of

fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).[8] *See generally* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 1.8(c) (1986). In the instant case, however, we do not face a constitutional issue involving defendant's due process rights. The Constitution *permits* allocation of the burden of proof to the defendant with respect to a defense which does not negate an element of the crime. *E.g., Patterson v. New York*, 432 U.S. 197 (1977). Therefore, because we have affirmed the district court's ruling that the offense charged may be proven without proof that defendant intended to take his motor vehicle into the protected area, or even knew that he had done so, the trial judge's ruling on the burden of proof on the necessity defense did not deny defendant any basic right. There still remains the question, however, whether the

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[8] The Court in *Mullaney* unanimously held that it was a violation of the constitutional guarantees of due process for Maine to require a murder defendant to shoulder the burden of persuasion of establishing that he acted in the heat of passion on sudden provocation, so as to qualify for conviction of the lesser offense of manslaughter. Two terms later, the Court considered a New York statute which similarly placed on the defendant in homicide cases the burden of persuasion as to the statutory defense of "extreme emotional disturbance." *Patterson v. New York*, 432 U.S. 197 (1977). The Court upheld that statute because the crime was defined broadly as requiring only two elements – intent to cause the death of another and causing the death of that person or a third person. Because there was no requirement analogous to the common law element of malice aforethought, the defense did not involve negating such an element, or any element, of the crime.

burden of proof was properly placed on defendant or whether some authority other than the Constitution would require the opposite conclusion. Unfortunately, neither the statutes, the regulations, nor the cases provide much guidance on when the burden of proof should be allocated to the defendant for such a defense. We must resolve the issue with the minimal guidance that these sources provide.

One factor which is relied on is a practical one. Often it is the defendant who is most likely to have access to the facts needed to prove such a defense, and this case seems to be of that type. This pragmatic element is one which may properly be taken into account, as the Supreme Court has recognized for at least most of this century. *See Morrison v. California*, 291 U.S. 82, 91 (1934). In *Morrison*, the Court stated that the burden of establishing an affirmative defense may properly be placed on the defendant if there exists "a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception." *Id.*

We think it is manifest that the regulation at issue here is "a general prohibition." It would be impractical, we believe, to impose on the government the burden of disproving necessity beyond a reasonable doubt, and this case demonstrates why this is so. It would be impractical to expect that the boundaries of wilderness areas could be policed in such a way that the government would have access to evidence to disprove a necessity defense. We think, in fact, that requiring the government to disprove

the necessity defense could impede enforcement of the regulatory scheme.

Therefore, we hold that the district judge did not err in ruling that Unser had the burden of proving the defense of necessity.

We note briefly that Unser raises a sufficiency of the evidence issue as part of his attack on the trial court's rulings on the necessity defense. This argument is at least partially premised on the contention, which we have rejected, that the burden of proof should have been on the government to establish beyond a reasonable doubt that Unser had already committed the violation by entering the wilderness area on his snowmobile before the emergency arose. That argument of course must fail as a consequence of our rejection of its premise.

Unser does also argue that the evidence was insufficient regardless of the burden of proof on the necessity defense. We have carefully reviewed the record and we disagree. Unser's argument on this point overlooks, among other things, Agent Burd's testimony that Unser's statements only three weeks after the ordeal were inconsistent with his trial testimony and that Unser had said then that he did not know where he had gone only because he hadn't been paying much attention, not because he was lost in a ground blizzard. Unser's argument on appeal also overlooks the evidence of the location of the second machine, and Unser's testimony that he had been following the windrows before the second machine failed. We have already noted that the trial judge specifically relied on these facts as strong evidence of the location of the first snowmobile. The evidence as to the

location of the second machine was much more certain, and the windrow evidence links that more definite point to the location of the first machine.

Much of Unser's argument is devoted to recounting the inconsistencies in the other evidence about the location of the first machine, with particular emphasis on the district judge's mistake in reading the scale of miles on the enlarged map, exhibit 3, to which we have previously referred.[9] This part of the evidence is somewhat troublesome. Applying the correct scale of miles, it appears that it is approximately 6.7 miles from the Red Lake Trail parking lot, where the ride began, to the boundary of the wilderness. As we have noted, Mr. Martin, on whom the trial judge relied heavily, estimated the distance at 7.2 miles, based on his having tried to retrace the route.

As Unser points out, the evidence was that Gayton had driven the machine twice just for practice, once at Unser's ranch and once in the area of the parking lot. Further, the evidence that the odometers overstate actual mileage because of slippage of the propulsion mechanism, evidence that Unser and Gayton had been making "play tracks" and then had been wandering apparently lost, and the fact that the rugged terrain would make it unlikely that the actual route taken would be as direct as a line drawn on a map, all are factors which, Unser urges, make it highly unlikely, if not impossible, that Gayton's

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[9] We remind the readers that the district judge's finding that the emergency arose about the time that the first machine had to be abandoned is what makes the spot where that machine was recovered of such great importance here.

machine reached the wilderness boundary, given that its odometer showed mileage of less than nine miles.

Although it may be that a rational fact finder could have accepted these contentions, we do not find the evidence so one-sided that we could hold the trial judge's adverse findings to be clearly erroneous. We believe that the district judge did not err in weighing all the evidence and finding that Unser had not proven by a preponderance of the evidence that the emergency arose before he entered the wilderness area.

V

Finally, we consider Unser's contentions relating to the statements he made in the meeting with Agents Burd and Schultz in Albuquerque. Unser makes two contentions. First, he says that his statements should have been suppressed because he was subjected to custodial interrogation without having been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Second, Unser contends that the statements should have been suppressed because they were involuntary, being the product of deception practiced on him by the agents. The district court rejected both contentions. The judge made a specific finding of fact that Unser was not in custody during the meeting, from which it followed that the agents were not required to advise him of his rights under *Miranda*. The judge also found that Unser was not coerced into making statements and concluded that the statements were voluntary.

The *Miranda* issue merits little discussion. The district court's finding that Unser was not in custody is

reviewed only for clear error. *United States v. Glover*, 104 F.3d 1570, 1578 (10th Cir. 1997). The evidence supporting the district judge's finding that Unser was not in custody was essentially undisputed and was easily sufficient. The evidence was that Unser voluntarily appeared both on January 7 and January 8. During both days Unser frequently took telephone calls on his cellular phone and obviously felt free to leave the room whenever he wanted because he did so, going out into the hallway to talk on the telephone several times. There was no evidence of any coercive tactics, nor of anything coercive about the atmosphere of the meeting which would have led Unser to believe that he was not free to leave at any time. We affirm the district court's conclusion that there was no violation of the requirements of *Miranda*.

As to the issue of voluntariness, as noted in part I-C, supra, Unser was told only that the agents would help him retrieve his snowmobile, even though the agents' purpose was to further their criminal investigation. The trial court found that "a measure of subterfuge" had been employed by the agents when they induced Unser to return to the offices in Albuquerque for the purpose of meeting with Agents Burd and Schultz, without telling Unser that he was the target of a criminal investigation and instead leading him to believe that they were simply trying to assist him in finding his abandoned snowmobile. On the other hand, the judge also found that the evidence would support a reasonable inference (which he apparently drew) that Unser knew that he might be cited for entering a wilderness area. The judge referred to Unser having brought retired Agent Martinez and retired

state trooper Valdez to the first meeting with Agent Tafoya. Also, the judge referred to testimony by Tafoya that at one point during his meeting with the three men, at a time when Unser himself might have left the room temporarily, Tafoya asked if Unser had been cited. The court found as a matter of fact that Unser's statements were not coerced.

We review the district court's subsidiary findings of fact only for clear error, but the issue of voluntariness of the statements is ultimately a question of law which we review *de novo*. *Glover*, 104 F.3d at 1579-80. On the legal issue of whether the statements were voluntary, we consider the age, intelligence, and education of the defendant; the length of the detention (if any); the length and nature of the questioning; whether the defendant was advised of his constitutional rights; and whether physical coercion was employed. *Glover*, 104 F.3d at 1579. The inquiry is to include all the facts and circumstances. *Id.* The ultimate question in this case is whether the promise of helping Unser to locate his snowmobile resulted in his will being overborne. *Id.*

We find no clear error in the trial court's subsidiary findings. These included findings that Unser was a man of intelligence and experience. As previously alluded to, the court found that the fact that Unser initially enlisted two men with law enforcement backgrounds to accompany him to meet with Tafoya suggested that Unser had some idea that he might be under investigation for entering the wilderness area with his snowmobile. The judge also found, as we read his comments, that Unser was a strong willed individual as evidenced by his having survived this ordeal and by other circumstances, including

the fact that Unser had achieved great fame and success as a race car driver in his earlier years.

Considering all the surrounding circumstances, we affirm the district judge's holding that the statements were voluntarily made and therefore admissible at trial.

VI

For the reasons given, the judgment is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Case No. 97-CR-110-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT W. UNSER,

Defendant.

ORDER

(Filed Feb. 04, 1999)

Upon defendant's renewed motion requesting stay of enforcement of penalty pending appeal,

IT IS ORDERED that the motion is GRANTED and the judgment entered on June 17, 1997 is STAYED pending further appeal.

BY THE COURT:

/s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Dated: February 4, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Case No. 97-CR-110-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT W. UNSER,

Defendant.

ORDER

(Filed Jun. 27, 1997)

Upon defendant's motion to stay enforcement of penalty pending appeal,

IT IS ORDERED that the motion is GRANTED and the judgment entered on June 17, 1997 is STAYED pending appeal.

BY THE COURT:

/s/ Lewis T. Babcock
Lewis T. Babcock, Judge

Dated: June 27, 1997

UNITED STATES DISTRICT COURT
District of Colorado

UNITED STATES OF AMERICA

v. Case Number
97-CR-110-B

ROBERT W. UNSER

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ROBERT W. UNSER, was represented by Armand Carian, Bobac A. Barjesteh and Todd Welch, Retained.

The defendant was found guilty on a One Count Information after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
16 USC 551 36 CFR 261.16(a) and 18 USC	POSSESSING AND USING A MOTOR VEHICLE WITHIN A NATIONAL FOREST WILDERNESS WITHOUT AUTHORIZATION AND AID AND ABET	12/20/96	One

As pronounced on June 12, 1997, the defendant is sentenced as provided in pages 2 through 2 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 17th day of June, 1997

/s/ Lewis T. Babcock
LEWIS T. BABCOCK, Judge
United States
District Court

Defendant's Date of Birth: February 20, 1934
Defendant's address: 770 CENTRAL, SW,
ALBUQUERQUE, NEW MEXICO 87105
Defendant: ROBERT W. UNSER
Case Number: 97-CR-110-B

FINE

The defendant shall pay a fine of $75.00. This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid within 10 days from date of sentencing.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Reporter's Transcript of Trial to Court, June 12, 1997, U.S. District Court for the District of Colorado, No. 97-CR-110-B

* * *

[p. 0564, line 13] Ruling

THE COURT: Please be seated. Okay. I've heard the evidence presented during this trial to the Court, and based upon that evidence I will enter my verdict. And in doing so I will, although not requested, make specific findings of fact and conclusions of law.

The findings of fact of course and the conclusions upon which they are based with regard to the elements that the government must establish to prove its charge are beyond a reasonable doubt.

The Court has determined that because there is no *mens rea* element to the affirmative – pardon me, it is late in the day, there is no *mens rea* element to the offense [p. 0565] itself, the affirmative defense as I have found and determined is one that must be established, as the defense has argued in its trial brief, by the most satisfying evidence, and I take that to be a preponderance of the evidence.

The findings of fact are necessarily determined only from the evidence that I have admitted and applying the various signposts and principles to determine weight of the evidence and credibility of it, as I routinely instruct juries in all cases, both civil and criminal.

The evidence has established that on December 20, 1996, Mr. Unser and his companion, Robert Gayton, drove from Chama, New Mexico to the Red Lake trail

head at the junction of Colorado Highway 17 and Road 114, apparently an old logging road, which is just south of La Manga Pass situated in the District of Colorado.

The evidence is not particularly in conflict with regard to the first part of the snowmobiling journey that day; that is, that they began around noon, maybe a little after, followed Road 114 in a northwesterly and then westerly direction, turned in a southerly to southeasterly direction to bend around and then back in a northwesterly direction to the Jarosa Peak area and Jarosa Mesa.

This mesa is situated just to the south of the boundary of the South San Juan Wilderness area. I will refer to it as "the wilderness area."

[p. 0566] And the evidence is consistent and it's clear that Mr. Unser and his companion climbed the bluff there to get up on top of the Jarosa Mesa. And it appears to me that that is a gain in altitude of from 11,200 feet to 11,400 feet. And I refer, because it has been of great assistance in my following, tracking the evidence, and the evidence, to Government's Exhibit 3. That is the USGS map which has been referred to consistently throughout the evidence here.

Once on top of the mesa, the evidence falls into conflict. The government's evidence through Mr. Martin reflects that Mr. Unser and his companion recreated – Mr. Martin called them play tracks – up on the Jarosa Peak mesa. And then as Mr. Martin was in the search effort after Mr. Unser and Mr. Gayton became lost, Mr. Martin testified, credibly, that he followed tracks from the play

area in a northwesterly direction to the point on Government's Exhibit 3 where he testified that search group found the snowmobile that Mr. Gayton had been riding and which had been abandoned.

The group I think consisted of about six individuals and half of the group was made up of friends of Mr. Unser and members of the New Mexico Search and Rescue Service, the other group was made up of people who were affiliated with the Colorado local rescue service.

That group split up. And it would be the group from [p. 0567] New Mexico traveled south in an effort to try to find Mr. Unser and Mr. Gayton. Mr. Martin and his companions went in a northeasterly direction and crossed Red Lake. Because of the weather and the time of day, turned back south to the area of the boundary of the wilderness area, and then I think he generally went a little bit east and north, and then back to the south and east until he rejoined Road 114, and then out back to the Red Lake trail head.

Red Lake, of course, is in the wilderness area. And the place where Mr. Martin says the first snowmobile was found is well within the wilderness area.

It is clear from having found the second sled, the Arctic Cat, that that machine too is well within the boundary of the wilderness area, not due east, but I would say about 85 clicks from north where indicated by Mr. Burd.

I should indicate at this point that there is no reasonable believable reason why certainly the Forest Service would move that sled from the location marked at the U

of South Elk Creek and that canyon there by Mr. Unser. It is wholly speculative and beyond any reasonable explanation that someone went up there, happened to find the Arctic Cat, drove it around in this wilderness area where it was found in June of this year still semi-buried in the snow.

Now Mr. Unser testified that he knows he did not leave that Arctic Cat in an area of trees. The photographs [p. 0568] show that it is situated in a tree area. Mr. Unser is simply mistaken because of the situation faced that night as to where he left that machine.

Beyond a reasonable doubt the Arctic Cat was proven to have been operated by Mr. Unser in the wilderness area.

Now Mr. Unser's, both, I think his testimony and his statement to Mr. Burd was to the effect that because of the wind conditions and the ground blizzard, of which I have no doubt, he with Mr. Gayton riding with him drove generally along the windrows. This is wholly consistent with and corroborates Mr. Martin's testimony as to the location of the Ski-Doo, almost due west, but probably five to ten clicks to the south of where Mr. Unser's machine was located. The testimony was that generally speaking these windrows run east to west.

There is another matter in evidence that corroborates Mr. Martin's testimony concerning the location of the Ski-Doo. Now that Ski-Doo, the evidence is from both the government and defense witnesses, that the odometer marked 8. something miles when found. No dispute about that. The scale on Exhibit 3 is 1 to 24,000, and there is a mileage scale at the bottom. I have, using a piece of

picture wire, calculated the mileage along the route both to the place that Mr. Sexson says the Ski-Doo was found and the place where Mr. Martin says the Ski-Doo was found. The place where Mr. Sexson says the [p. 0569] Ski-Doo was found, at least on the line, is about 3.1 miles, and about 4.2 or about 4 and a quarter total up to the place where Mr. Martin indicates the Ski-Doo was found. Allowing for some recreation, allowing for the climb up Jarosa Peak and the inaccuracies of a Ski-Doo odometer, the mileage on the Ski-Doo is most consistent with the location that Mr. Martin indicated on Exhibit 3 where the Ski-Doo is found. Indeed, if one did not recreate along the way, the mileage on the Ski-Doo would put it to the north and west of Dipping Lake, also well within the boundary of the wilderness area.

Now I am not satisfied that the parties got up to Dipping Lake, but the place where the Ski-Doo was found to Dipping Lake is about another 1.5 to 6 miles.

The coordinator of the search and rescue, Leslie Allison, debriefed that party that searched on the 21st for Mr. Unser back at the High Country restaurant in Chama, New Mexico. And the party who had been searching and found the first snowmobile, the Ski-Doo, was queried as to the location where that machine was found, for good reason. I mean that gives a reference point for further search.

Allowing that there was emotion and grave concern for the welfare of Mr. Unser and his companion, it's clear that both Ms. Allison as well as the individuals who she interviewed and debriefed would want and have every motivation be as clear and accurate as humanly possible

because lives [p. 0570] were at stake, so what they would have said to her that night would carry great weight with her plan to identify an area to search the next day. And based upon that information she identified the area south of Dipping Lake as the area most likely to yield a productive search. This lends further credibility to the testimony of Mr. Martin in my determination as to where that first machine was found. And, of course, it's clear where the second sled was abandoned.

Based upon these findings, I conclude that the government has established beyond a reasonable doubt that on or about the date charged in the Information in this case Mr. Unser operated a motor vehicle within the boundaries of the South San Juan Wilderness area without authorization by federal law or regulation.

The inquiry, of course, does not stop here. The regulations themselves, which have been attached to the government's brief in response to the defendant's trial brief, and the regulations cited by the defense in its trial brief reflects that there is provision for addressing emergencies within the boundaries of a wilderness area through the use of motor vehicles, such as aircraft, or in this case, other snowmobiles.

These regulations do not afford the individual in an emergency situation the right to operate the motor vehicle absent authorization by the appropriate Forest Service [p. 0571] official, coordinated, as in this case, with the county sheriff, I believe it would be the Conejos County Sheriff. The testimony that I've heard indicates that this authorization can be obtained and implemented expeditiously at all times.

Having said that, I nevertheless believe that this is a unique case. I don't know that a case just like this may have ever been tried before, but the law ought to afford, and I believe does, a measure of defense to the citation issued here based upon emergency and defenses otherwise known essentially as a necessity defense, sometimes called a choice of evils defense.

I've looked at the Tenth Circuit cases **Turner** and **Meraz-Valeta** which address the necessity defense to a criminal charge. The Model Penal Code and Colorado Revised Statutes, although not applicable here, contains a similar provision in 18 Colorado Revised Statutes 702, it's called a choice of evils defense.

Inasmuch as I said there is no *mens rea* element to the government's burden of proof here, and as recognized by the defense in its trial brief, the burden of establishing this defense by a preponderance of the evidence falls to Mr. Unser, that then raises the question of fact concerning when the emergency arose. And I think perhaps it is in this area that the evidence is particularly troubling.

[p. 0572] First, I know Mr. Unser said that – testified under oath that as soon as he and Mr. Grason got to the top of Jarosa Mesa, the wind came up, and it was apparent to Mr. Unser that he should get off of the mesa with Mr. Grason – Gayton, I am sorry, because of those wind conditions, the concern being of course that Mr. Gayton could be lost and was a beginning snowmobiler. If that's the case, then a reasonable person in those circumstances would have turned around and looked at the tracks and followed the tracks right back out right then. If the wind was so bad just as they got to the top of Jarosa Mesa that

Mr. Unser couldn't see his tracks, he had that compass in his emergency pack, and he should have taken that compass out. It is clear to me that either he knew or should have known from his general familiarity with that area, having snowmobiled in the Jarosa Mesa area, that he would have gone in in a generally northwesterly direction, and so he would have to come out in a generally southeasterly direction. It simply defies common sense that one then would continue on to the northwest, which is clearly going away from safety and not towards safety. That compass was there all along.

I am more satisfied from the evidence that Mr. Unser and Mr. Gayton decided to recreate on further to the northwest. You know, that Jarosa Mesa – I think I said it's at eleven six, and the mesa to the northwest is also at eleven [p. 0573] six, and I think you only have to drop down about 120, feet over this saddle just to the north of where Mr. Sexson said that he thought the first sled was found to get onto that mesa, that bench that follows along the – what do they call it, the cattle drive, driveway path, La Manga driveway path.

I frankly am of the opinion, from hearing all of the evidence in this case, that Mr. Unser and Mr. Gayton – that would not be a difficult drop through that little stand of trees on that saddle. Mr. Unser and Mr. Gayton recreated on up in there. Whether they knew they were in the wilderness area or not is irrelevant. I am not satisfied that a true emergency arose until time either just before or just after Mr. Gayton's machine got stuck.

I am not satisfied that the defense has carried its burden to show that the affirmative defense of necessity

has been established here. The elements depend on what you read. In **Meraz-Valeta** they are that there was no legal alternative to violating the law, the harm to be prevented was imminent, and a direct causal relationship is reasonably anticipated to exist between defendant's actions and avoidance of the harm.

I think as it applies to this strict liability defense, the first element should be modified to fit a situation where the violation may have been accidental, and that would be that there was no legal alternative of which the defendant knew or should have known at the time to violating [p. 0574] the law. And I am not satisfied that the defense has met its burden with regard to this element.

The rule under the Model Penal Code is similar, and it reads: Unless inconsistent with other provisions of Sections 18-1-703 to 18-1-707, those deal with self-defense in terms of use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor. And that language is important here and which is of significant gravity, that according to ordinary standards of intelligence and morality the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

One of the threads that runs through the theory of this type of defense is that the actor, the defendant, not be

responsible for placing oneself in the position of violating the criminal statute. In this case Mr. Unser did.

I would also find and conclude that this defense is not available because the offense charged here was in fact committed before the emergency sufficient to give rise to such a defense occurred, and that would act as a bar to the [p. 0575] affirmative defense.

There is one other facet of reasonability and that is the possession of and use of maps. Now you can buy these USGS maps of Lo-Do Denver, Patagonia. You can buy them all over the place. You can buy them from the government simply by calling or writing. And Government's Exhibit 14 is a map provided by I believe the Forest Service which, although it doesn't have the contours on it, it has a scale and it has the boundary of the wilderness area marked. And anybody recreating where there is a wilderness area nearby simply ought to use one of these maps. Clearly a use of both the contour map, the USGS map and the Forest Service map would have prevented this from happening at all.

I conclude that the defendant is guilty of this offense beyond a reasonable doubt and will so enter my verdict.

Having done that, I want to say that – and this has nothing to do with the verdict, but clearly Mr. Unser had a harrowing life-threatening experience. It's through grit and perhaps some divine intervention that he's with us here today for this trial. I am sure he's not happy to be here at a trial, but I am sure he's very happy to be here at all. And I appreciate that.

The other thing that I need to say is that – and it's a confession, I guess. I have been a federal Judge now [p. 0576] for almost nine years, and I've never tried a petty offense. Frankly, I don't know what to do next. I've never – I mean we have this – we have this process in felony cases where now an individual would perhaps be remanded to the custody of the United States marshal and we would make the probation officer available to the defendant for preparation of a presentence report, which would be put off some 12 weeks, then we would have a full-blown sentencing hearing where we would apply sentencing guidelines. And it's not a simple process, it's very complex, although it's one I am familiar with. I do it almost every day. But I don't know what to do next in a petty offense case.

MR. KENNEDY: Your Honor, may –

THE COURT: Sure.

MR. KENNEDY: Your Honor, the Sentencing Guidelines do not apply to petty offenses, and it is customary for magistrates in bench trials to impose a sentence if they do find them guilty normally at the time after they found them guilty and for the government to make a recommendation. Frankly, what I would do in this case is just make a general recommendation of a modest fine and leave that up to the Court.

MR. CARIAN: And I would make a recommendation that the Court – I don't know if the Court has at its disposal a criminal record. Usually those are available at the time of [p. 0577] sentencing. I would represent –

THE COURT: The only record of Mr. Unser I have available is three wins at Indianapolis.

MR. CARIAN: I would ask that the Court defer or suspend any fine.

THE COURT: Well, I think some fine is reasonable. I don't know whether there's any – you know, one of the things that we try to do is act with some parity so that people similarly situated are treated similarly. I don't know. Mr. Kennedy, have you had any experience with any –

MR. KENNEDY: This is my first snowmobile case, your Honor, in the wilderness. I think the Forest Service had originally made some recommendations to me of a fine around $500. I made an offer in this case of a $250 fine and plead no contest at one point in this case. And I am just indicating to the Court, giving the Court some idea of what I was thinking about.

THE COURT: Well, one person's modesty I guess is another person – you know, $500 would go a long way to cover my daughter's wedding dress.

MR. CARIAN: It's my understanding that the typical fine for this type of offense – I have never been able to find another fine for another snowmobile offense, which the rumor I heard is between 50 and $75. But I have been involved in misdemeanor matters for quite sometime, and I believe one [p. 0578] of the factors the Court takes into consideration is that this indeed is a first offense, and if there's any prior offenses, that would tend to enhance such a fine. I don't believe a request for a fine and having it suspended or deferred is inappropriate in

this particular case taking into consideration all of its facts and circumstances.

MR. KENNEDY: Your Honor, if I may interrupt just a moment. Agent Burd informed me that if this case had been cited as a collateral forfeiture, where instead of going to trial the individual agreed to forfeit an amount, there's a standard collateral forfeiture amount of $75 in these cases. So I am giving the Court the gamut on this and the Court can indicate whether there are aggravating circumstances or mitigating circumstances here to make that assessment.

MR. CARIAN: I am not aware of any aggravating circumstances to this offense. I certainly am aware of the many mitigating circumstances and the Court has already heard of those.

THE COURT: Yeah, I am too. Well, I mean there's no question that the Forest Service has gone to great lengths to see this case to conclusion, and it may not be over yet. There is some relatively novel issues of law that I've had to address here, and it may well be that Mr. Unser wants to take an appeal. You have a right to appeal, of course, and I think from this point on it is to the Tenth Circuit Court of [p. 0579] Appeals. Home base is right across the street. Well, you know, there is another facet to a sentencing process and that is known as the right of allocution. What that means, Mr. Unser, is you have a right now to say anything to me, sir, that you want to.

MR. CARIAN: Your Honor, it's too late for that to start, I think at this time.

THE COURT: Why is that?

MR. CARIAN: We all need to get home.

THE COURT: It's not too late for Mr. Unser, because Mr. Unser never looks at his watch.

MR. CARIAN: I don't think Mr. Unser –

THE COURT: Or his compass. I guess that's why he likes to drive on an oval. Mr. Unser, really, anything you wish to say, sir?

THE DEFENDANT: There's not much I can say that I haven't said, Judge, except – I guess I am supposed to stand.

MR. CARIAN: Uh-huh.

THE DEFENDANT: There's not really anything that I haven't said, except that I did tell you the truth, and you did figure the mileage – in real life, if I took you up there, it just would be wrong on all of your figuring there. I know how you did it. It doesn't work that way when you are in the mountains going around corners and up and down. I think that you would find that our case was right. I wish I [p. 0580] could take everybody that argued the point up there and show them, because I didn't tell you any lies, I told you the truth. And I am not going to gripe at you or anything like that. I just want you to know that I did everything in all sincerity. And I went into this thing with open eyes knowing we could lose, but I certainly didn't intend to. And I certainly thought we had a good case, and I – I most importantly thought that I was totally right. This is probably getting me in more trouble, but nonetheless, I have to tell you my feelings if you told me to stand up and do it.

THE COURT: That's right.

THE DEFENDANT: So basically that's all I have to say. I really thank you for your time and for your sincerity in the thing too.

THE COURT: Well, I would be tickled to death for you to take me up there too, but I am not sure I could keep up with you. And I sure wouldn't want to ride in a snowmobile past any boundary, if I could find it. And I know things are different on the ground than they are in the courtroom. We do the best we can to reconstruct the facts from the evidence that is presented.

All right. $75. I guess that's all I need to say. I am not sure what we do next to get the $75.

MR. CARIAN: I think a judgment and sentence is prepared.

[p. 0581] MR. KENNEDY: Yeah. And I think maybe someone down in the clerk's office – I don't know if Norma is familiar, but some of the clerks in the clerk's office would know how to do that.

MR. CARIAN: Yeah. I think the document is prepared, it is sent to us, it is filed with the Court.

THE COURT: I will give you – how much time do you want? I think you are probably good for it, unless we stay execution of the sentence pending appeal.

THE DEFENDANT: I can give you a check or cash, whatever you need.

THE COURT: Well, we probably can't tonight, because they've closed the office, but, what, ten days?

MR. CARIAN: I think it has to be sent to the law office, and then we'll send it over to you.

THE COURT: Okay. Anything further this evening?

MR. CARIAN: Thank you, your Honor.

MR. KENNEDY: No, your Honor.

THE COURT: Thank you. We will be in recess. Interesting trial.

(Proceedings concluded at 6:05 p.m.)

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

16 U.S.C. § 551. Protection of national forests; rules and regulations

The Secretary of Agriculture shall made provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with

the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

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16 U.S.C. § 1133. Use of wilderness areas

(a) Purposes of national forests, national park system, and national wildlife refuge system; other provisions applicable to national forests, Superior National Forest, and national park system

The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and –

(1) Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215) [16 U.S.C.A. §§ 528-531].

(2) Nothing in this chapter shall modify the restrictions and provisions of the Shipstead-Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020), the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607,

Eighty-fourth Congress, June 22, 1956; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this chapter shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this chapter shall in no manner lower the standards evolved for the use of preservation of such park, monument, or other unit of the national park system in accordance with sections 1 and 2 to 4 of this title, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432 et seq.); section 3(2) of the Federal Power Act (16 U.S.C. 796(2)); and the Act of August 21, 1935 (49 Stat. 666; 16 U.S.C. 461 et seq.).

(b) Agency responsibility for preservation and administration to preserve wilderness character; public purposes of wilderness areas

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

(c) Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

(d) Special provisions

The following special provisions are hereby made:

(1) Aircraft or motorboats; fire, insects, and diseases

Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

(2) Mineral activities, surveys for mineral value

Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

(3) Mining and mineral leasing laws; leases, permits, and licenses; withdrawal of minerals from appropriation and disposition

Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining,

and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this chapter as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and use so much of the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available, and if the timber is cut under sound principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining or prospecting shall be allowed except as otherwise expressly provided in this chapter: Provided, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this chapter shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after September 3, 1964

within the boundaries of wilderness areas designated by this chapter shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this chapter shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

(4) Water resources, reservoirs, and other facilities; grazing

Within wilderness areas in the national forests designated by this chapter, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to

September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

(5) Commercial services

Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

(6) State water laws exemption

Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(7) State jurisdiction of wildlife and fish in national forests

Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

36 C.F.R. Ch. II § 261.2 Definitions.

The following definitions apply to this part:

Archaeological resource means any material remains of prehistoric or historic human life or activities which are of archaeological interest and are at least 50 years of age, and the physical site, location, or context in which they are found.

Campfire means a fire, not within any building, mobile home or living accommodation mounted on a motor vehicle, which is used for cooking, personal warmth, lighting, ceremonial, or esthetic purposes. *Fire* includes campfire.

Camping means the temporary use of National Forest System lands for the purpose of overnight occupancy without a permanently-fixed structure.

Camping equipment means the personal property used in or suitable for camping, and includes any vehicle used for transportation and all equipment in possession of a person camping. Food and beverage are not considered camping equipment.

Cave means any naturally occurring void, cavity, recess, or system of interconnected passages beneath the surface of the earth or within a cliff or ledge and which is large enough to permit a person to enter, whether the entrance is excavated or naturally formed. Such term shall include any natural pit, sinkhole, or other opening which is an extensive [sic] of a cave entrance or which is an integral part of the cave.

Cave resources mean any materials or substances occurring in caves including, but not limited to, biotic,

cultural, mineralogic, palenontologic, geologic, and hydrologic resources.

Commercial use or activity – any use or activity on National Forest System lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, regardless of whether the use or activity is intended to produce a profit.

Damaging means to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill or in any way harm or disturb.

Developed recreation site means an area which has been improved or developed for recreation.

Distribution of printed material – disseminating, posting, affixing, or erecting printed material as defined in this section.

Forest development road means a road wholly or partly within or adjacent to and serving a part of the National Forest System and which has been included in the Forest Development Road System Plan.

Forest development trail means a trail wholly or partly within or adjacent to and servicing a part of the National Forest System and which has been included in the Forest Development Trail System Plan.

Forest officer means an employee of the Forest Service.

Historical resource means any structural, architectural, archaeological, artifactual or other material remains of

past human life or activities which are of historical interest and are at least 50 years of age, and the physical site, location, or context in which they are found.

Motorized equipment means any machine activated by a nonliving power source except small battery-powered handcarried devices such as flashlights, shavers, Geiger counters, and cameras.

Motor vehicle means any vehicle which is self-propelled or any vehicle which is propelled by electric power obtained from batteries, but not operated on rails.

National Forest System includes all national forest lands and waters reserved or withdrawn from the public domain of the United States, national forest lands and waters acquired through purchase, exchange, donation, or other means, national grasslands and land utilization projects and waters administered under title III of the Bankhead-Jones Farm Tenant Act (50 Stat. 525, 7 U.S.C. 1010-1012), and other lands, waters, or interests therein acquired under the Wild and Scenic River Act (16 U.S.C. 1271-1287) or National Trails System Act (16 U.S.C. 1241-1249).

National Forest wilderness means those parts of the National Forest System which were designated units of the National Wilderness Preservation System by the Wilderness Act of September 3, 1964, and such other areas of the National Forest System as are added to the wilderness system by act of Congress.

Operating plan means a plan of operations as provided for in 36 CFR part 228, subpart A, and a surface use

plan of operations as provided for in 36 CFR part 228, subpart E.

Paleontological resource means any evidence of fossilized remains of multi-cellular invertebrate and vertebrate animals and multicellular paints, including imprints thereof. Organic remains primarily collected for use as fuel such as coal and oil are Paleontological Resources, but are excluded from the prohibitions under the rule.

Person means natural person, corporation, company, partnership, trust, firm, or association of persons.

Permission means oral authorization by a forest officer.

Permit means authorization in writing by a forest officer.

Prehistoric resource means any structural, architectural, archaeological, artifactual or other material remains of past human life or activity generally prior to the advent of written records and of anthropological interest, and the physical site, location, or context in which they are found.

Primitive areas are those areas within the National Forest System classified as *Primitive* on the effective date of the Wilderness Act, September 3, 1964.

Printed material – any written and/or graphic material including but not limited to pamphlets, brochures, photographs, graphics, signs, and posters.

Publicly nude means nude in any place where a person may be observed by another person. Any person is nude if the person has failed to cover the rectal area,

pubic area or genitals. A female person is also nude if she has failed to cover both breasts below a point immediately above the top of the areola. Each such covering must be fully opaque. No person under the age of 10 years shall be considered publicly nude.

Special-use authorization means a permit, term permit, lease or easement which allows occupancy, or use rights or privileges of National Forest System land.

State means any State, the Commonwealth of Puerto Rico, and the District of Columbia.

State law means the law of any State in whose exterior boundaries an act or omission occurs regardless of whether State law is otherwise applicable.

Stove fire means a campfire built inside an enclosed stove or grill, a portable brazier, or a pressurized liquid or gas stove, including a space-heating device.

Unauthorized livestock means any cattle, sheep, goat, hog, or equine not definded [sic] as a wild free-roaming horse or burro by § 222.20(b)(13), which is not authorized by permit to be upon the land on which the livestock is located and which is not related to use authorized by a grazing permit; provided, that noncommercial pack and saddle stock used by recreationists, travelers, other Forest visitors for occasional trips, as well as livestock be trailed over an established driveway when there is no overnight stop on Forest Service administered land do not fall under this definition.

Vehicle means any device in, upon, or by which any person or property is or may be transported, including

any frame, chassis, or body of any motor vehicle, except devices used exclusively upon stationary rails or tracks.

Volunteer or hosted enrollee means any person, not a Forest Service employee, officially participating in a Forest Service human resource program as authorized by an act of Congress and identified to accomplish one or more of the following objectives: provide skills training; education; useful work; develop understanding of ecological systems and conservation of natural resources; build cultural and communication bridges between various socioeconomic groups; and further the administration, development, and management of National Forest resources, forest research, and State and Private Forest activities.

Wild free-roaming horses and burros mean all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat, but does not include any horse or burro introduced onto National Forest System lands on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership. Unbranded, claimed horses and burros, where the claim is found to be erroneous, are also considered as wild and free-roaming if they meet the criteria above.

36 C.F.R. Ch. II § 261.16 National Forest Wilderness.

The following are prohibited in a National Forest Wilderness:

(a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation.

(b) Possessing or using a hang glider or bicycle.

(c) Landing of aircraft, or dropping or picking up of any material, supplies, or person by means of aircraft, including a helicopter.

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No. 98-1600

In the
Supreme Court of the United States
October Term, 1998

ROBERT W. "BOBBY" UNSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a person can be convicted of a crime without proof of *mens rea*:

a. in the absence of a clear indication on the part of Congress to dispense with the *mens rea* requirement; and

b. when the crime does not satisfy the requirements for a public welfare offense as established by *Morissette v. United States*, 342 U.S. 246 (1952), and its progeny?

2. Whether a court may shift the burden of proof of an affirmative defense to the defendant in the absence of an act of Congress authorizing that shift without violating the Due Process Clause of the Fifth Amendment?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the adoption, interpretation, and administration of laws and regulations.

There is a growing trend among federal agencies and the courts to expand the enforcement power of the government incrementally by adopting regulatory interpretations that go

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

beyond their plain meaning and intent. This case is a singular example of government overreaching.

Contrary to common sense and Supreme Court precedent, the Tenth Circuit has held innocent conduct constitutes a crime punishable by fine or imprisonment or both under a federal statute. Strict liability offenses undermine the freedoms of all citizens and should be narrowly construed.

PLF has participated in numerous cases involving the interpretation of federal laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998); *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective will provide a necessary viewpoint on the issues presented in this case.

INTRODUCTION

This case presents an outrageous application of the "public welfare offense" doctrine. Under Tenth Circuit jurisprudence, innocent conduct becomes criminal--a snowmobiler loses his way in a snowstorm and is convicted of possessing and operating a motor vehicle in an unmarked Wilderness Area. This is contrary to Supreme Court precedent and an assault on common sense. Only in very limited circumstances has this Court inferred from congressional silence that Congress did not intend to require proof of criminal intent to establish an offense. However, some lower courts are regularly making just such an inference.

To be sure, strict criminal liability eases the prosecution's path to conviction and facilitates enforcement of the law but only at the expense of fundamental concepts of fairness and constitutional principles of due process. This case, and others like it, turn our traditional values upside down. American jurisprudence is founded on the bedrock principle that it is better to let the guilty go free than unfairly punish the innocent. The idea that one can be held criminally liable, even imprisoned, for innocent conduct serves no meaningful law enforcement purpose. It neither reforms conduct nor deters wrongdoing. To the contrary, it serves only to place retaliation and vengeance as the motivation for public prosecution.

Strict criminal liability for ordinary acts is reminiscent of those immature systems of law whereby a tribunal is convened only to establish guilt for enemies of the state and not to determine innocence. This type of process is incompatible with a free society and should not be countenanced by this Court, or any other. For this reason, this Court should grant the petition for writ of certiorari and place meaningful limits on the expanding scope of the "public welfare offense" doctrine. Virtually all of our criminal laws serve to protect public health and welfare. All of us are capable of unwitting acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would criminalize a broad range of apparently innocent conduct.

STATEMENT OF THE CASE

Robert "Bobby" Unser and a friend were snowmobiling in Southern Colorado in the area of the Rio Grande National Forest. During their venture, sudden winds blew fallen snow in their path reducing visibility to near zero. In the process of finding their way back to their starting point, Unser and his friend became lost. Unser's friend drove off into a ravine where his snowmobile stuck. The two men continued on Unser's snowmobile until it quit. Believing themselves in danger, they tried walking out of the area. However, by nightfall, they were

still lost and had to pass the night in a snow cave they dug with their hands. They survived the night but were in dire straits. At times disoriented and sick, they walked most of the next day and night until they came on a barn with a phone. They called for help and were rescued. Unser and his friend were treated at a local hospital for frostbite, dehydration, and exhaustion.

Three weeks later, Unser contacted the Forest Service for assistance in finding his snowmobiles. It became apparent from Unser's description of the area where he thought he had abandoned the snowmobiles that he and his friend had inadvertently entered the South San Juan Wilderness Area while lost in the snow storm. A Forest Service regulation prohibited the possession or use of a motorized vehicle in the Wilderness Area and imposed a criminal penalty of up to six months in jail or $5,000 in fines, or both. Unser was cited for violating this regulation. He was subsequently convicted of a misdemeanor, and fined $75.

On principle, Unser appealed the case arguing he could not be found guilty of a crime without some knowledge or criminal intent and, in any event, he was excused because of necessity. On review, the Tenth Circuit Court of Appeals held that Unser could be held liable for a crime without any "guilty purpose" because the regulation prohibiting motorized vehicles in a Wilderness Area constituted a "public welfare offense." Such offenses, the court argued, do not require criminal intent (or *mens rea*). The court dismissed the necessity defense for lack of evidence.

SUMMARY OF THE ARGUMENT

The Tenth Circuit has taken the "public welfare offense" to a ridiculous extreme, finding that wholly innocent conduct is a crime. This ruling is important because it draws into question fundamental principles of criminal law. With the complicity of the courts, legislators and prosecutorial agencies are seeking quick convictions based on strict liability offenses. This is most

evident in the increasing enforcement trends under federal environmental statutes which are readily characterized as "public welfare" statutes. But when such offenses encompass innocuous acts, they fail to deter crime and defy common sense. Such strict regulation violates the long-held doctrine that an injury can amount to a crime only when inflicted by guilty intention.

The Tenth Circuit read too much into this Court's acknowledgment in *Morissette* that a "public welfare offense" may obviate the intent element of a crime. In *Morissette*, this Court found the crime of conversion of government property required a criminal intent that was lacking in that case as the accused did not know he was stealing. This Court expressly affirmed that criminal intent must accompany criminal act and narrowly circumscribed the "public welfare offense" doctrine. Only in limited circumstances has this Court inferred from silence that Congress did not intend to require proof of *mens rea*, such as where the penalties are small, conviction does no grave harm to one's reputation, and where one assumes a special responsibility to protect the public from one's acts. However, these factors did not converge in this case.

Unser was potentially subject to a criminal penalty of up to six months in jail or $5,000 in fines, or both. It would be inconceivable to characterize these penalties as "small." As a factual matter, Unser was publicly ridiculed as an environmental criminal. Therefore, grave harm was done his reputation. As for his special responsibility to protect the public, Unser had no reason to believe his innocent outing would become life-threatening and force him into a technical violation of the law by mistakenly wandering into a Wilderness Area. Accordingly, *Morissette* undercuts the decision below. So does *Staples v. United States*, but in a more direct way.

In *Staples*, this Court applied a common sense examination to determine whether mere possession of a gun under the National Firearms Act was a "public welfare offense" that did not require a criminal intent. Notwithstanding persistent

arguments by the government that a gun is a dangerous device and is highly regulated, this Court found the possession of a gun was innocent conduct that did not justify eliminating a *mens rea* requirement when Congress was silent on the subject. The impetus for the Court's decision was its concern for criminalizing a "broad range of apparently innocent conduct." Under *Staples*, the innocence of the conduct is a factor in defining a "public welfare offense." This is the crucial point the Tenth Circuit missed.

The present case parallels *Staples* and dictates the same result. Unser was convicted of possession and operation of a motor vehicle within a Wilderness Area under a federal statute that was silent on the intent element. His conduct was innocent as he was driven by a snow storm out of his way and blundered into the unmarked area. If possession of a gun is not a "public welfare offense," neither is possession and operation of a snowmobile in extremis. The Tenth Circuit's contrary ruling defies common sense and establishes a precedent that justifies criminalizing a broad range of apparently innocent conduct. This Court should grant review and overturn the decision below.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF LAW PERTAINING TO THE CRIMINALIZATION OF A BROAD RANGE OF INNOCENT CONDUCT

A. Overzealous Application of the "Public Welfare Offense" Raises Questions Both Fundamental and Far-Reaching in Federal Criminal Law That Warrant a Response by This Court

The importance of this case cannot be overstated. As the Tenth Circuit explained:

> This case arises from a story of survival in the wilderness under extreme conditions and involves legal issues requiring examination of some of the most fundamental concepts in criminal law. Like the parties obviously do, we view the case as having significance beyond the penalty actually imposed.

Indeed, this case is significant because the lower court decision authorizes criminal prosecution for inadvertent conduct that causes no real harm to public health or safety. In fact, this case turns fundamental concepts of criminal law on their head. It does away with the presumption of innocence and infers strict criminal liability from both congressional and agency silence. The lower court's lavish extension of the so-called "public welfare offense" exceeds the bounds of reason, good government, and the established precedents of this Court.

Regrettably, overzealous application of the "public welfare offense" seems to be a growing trend as Petitioner points out in his brief, establishing a conflict among the circuits. Moreover, there is a growing trend among prosecutorial agencies to rely on the ease of strict liability statutes to get a quick conviction. Nowhere is this more evident than in the enforcement of our federal environmental laws.

In a recent law review article, *Criminal Enforcement of Environmental Laws*, 10 Colorado Journal of International Environmental Law & Policy 39, Kevin Gaynor and Thomas Bartman catalogue the increase in environmental law enforcement over the last ten or more years. They discuss with some concern the tendency for courts and prosecutors to raise the penalty while lowering the bar on convictions. "Thus, the sanctions for environmental crimes increasingly include significant terms of imprisonment." *Id.* at 40. But, "[u]nder current case law in most circuits, the standard of intent the government must show for a conviction is less than a general intent standard and does not necessarily require proof that the defendant had knowledge of all the material facts." *Id.* at 39.

Statistically, the authors report:

> EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison.

Id. at 40.

These figures would be something to cheer about if they included only serious offenses occasioned by willful conduct. But to the extent they include trivial violations occasioned by seemingly innocent conduct, these figures are cause for concern. While cases such as *Unser* give us a warm feeling because they add arithmetically to the appearance of vigorous enforcement of the law, they actually document the eroding rights of the individual--rights the courts should be protecting but are not.

According to Gaynor and Bartman, the latest amendments to each major environmental statute included new criminal penalties and strengthened existing penalties. Some of these amendments expanded the scope of criminal liability by introducing lower or no intent crimes, such as mere "negligent" conduct under the Clean Air Act. *Id.* at 40. The Clean Water Act has a similar provision. *See* 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Moreover, "[t]he federal sentencing guidelines governs [*sic*] the sentencing of individuals convicted of environmental offenses and has limited the discretion of judges to mitigate statutory penalties, even in cases that do not involve environmental injury." *Id.* at 41.

Gaynor and Bartman conclude: "The view of environmental laws as 'public welfare' statutes and the corresponding trend toward liberal construction and precedent involving nonenvironmental public welfare statutes have complicated the issue of culpability." *Id.* at 59.

This complicated issue of culpability requires clarification by this Court. Clearly, strict criminal liability offenses are proliferating. As they expand to encompass inadvertent acts such as those taken by Unser, they put ordinary citizens at risk of criminal conviction for wholly innocent conduct. The imposition of criminal penalties in the absence of a criminal intent violates the central theme of criminal law that "wrongdoing must be conscious to be criminal" and is incompatible with a free society. *See Morissette*, 342 U.S at 252.

The observation and admonition of Gaynor and Bartman warrants the attention of this Court:

> EPA Administrator Carol Browner has advocated recent environmental criminal legislation on grounds that environmental criminals should be treated forcefully, like drug dealers. No acknowledgement is made in this connection that drug dealers usually receive a higher intent standard than has been the case in the area of environmental crimes. One of the supporters of the Environmental Crimes and Enforcement Act of 1996, Senator Frank Lautenberg, noted that it was "aimed at bad actors who violate our environmental laws purposely, intentionally, or with knowing disregard for the impact of their actions." Environmental Crimes and Enforcement Act of 1996, S. 2096, 104th Cong. (1996). These are clearly the proper targets of criminal prosecution, rather than the persons potentially and actually reached by the slip

> and-fall negligence standard that has generally been followed in this area.

Gaynor and Bartman, 10 Colo. J. Int'l Env. L & Poly at n. 334.

To protect the innocent from criminal conviction, this Court should grant the writ of certiorari and reverse the lower court.

B. Statutory Silence Does Not Imply Congress Intended to Eliminate a Criminal Intent Element Because Under *Morissette* the Existence of a *Mens Rea* Is the Rule of Law, Not the Exception

The Tenth Circuit recognized but did not seriously consider the implication of Congress' silence regarding the knowledge requirement of a crime under 16 U.S.C. § 551. That provision authorized the Secretary of Agriculture to promulgate regulations for the protection of national forests and to impose a penalty of not more than $5,000, or imprisonment for not more than six months, or both. The regulation under which Unser was prosecuted provided:

> The following are prohibited in a National Forest Wilderness:
>
> (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation.

36 C.F.R. § 261.16.

The lower court acknowledged that this language reveals nothing about the intent of Congress respecting a *mens rea* element and even cited this Court's reaffirmation in *Staples v. United States*, 511 U.S. 600, that "silence on this point by itself does not necessarily suggest that the [legislators] intended to dispense with a conventional *mens rea* element." *Unser v. United States*, 165 F.3d 755, 762 (1999) (citing *Staples*, 511 U.S. at 605). However, this reference proved to be no more

than lip service as the court seized on the notion of a "public welfare offense," as expressed by this Court in *Morissette v. United States*, 342 U.S. 246.

But *Morissette* limits rather than expands the "public welfare offense" doctrine. So that case undercuts the lower court opinion here. Morissette took some old shell casings from an Air Force bombing range which he believed were abandoned scrap. After selling these casings for $84, Morissette was convicted of knowingly stealing and converting government property and sentenced to imprisonment for two months or to pay a fine of $200. The lower court ruled the "knowing" offense did not require a criminal intent, basing its ruling on the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922), leading to the so-called "public welfare offenses." *See Morissette*, 342 U.S. at 250.

This Court acknowledged it had, on occasion, construed mere omission of "any mention of criminal intent as dispensing with it," but this Court reversed the lower court in *Morissette* pointing out with great care the dangers of a verbatim reading of its prior cases:

> If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more--it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Id. at 250.

This Court's philosophy of criminal law was eloquently stated this way:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id.

The Tenth Circuit in this case is guilty of too much literalness and ascribing more to the "public welfare offense" doctrine than was contemplated. Its holding that a purely innocent act may subject the actor to criminal liability is inconsistent with any fair-minded philosophy of criminal law and sweeps within its arms a whole array of federal statutes--particularly those designed for natural resource protection--that do not expressly preserve a *mens rea* requirement.

In *Morissette*, this Court characterized "public welfare offenses" as those cases in which the penalties are small, conviction does no grave harm to one's reputation, and where one assumes a special responsibility to protect the public from one's acts. *Id.* at 256. But these factors converge rarely and, in this case, not all.

As Petitioner aptly explains, Unser was potentially subject to a criminal penalty of up to six months in jail or $5,000 in fines, or both. It is inconceivable that anyone's liberty could be taken away for six months and be characterized as a "small"

penalty. Our forefathers would not have sold their freedom so cheaply. As to reputation, Unser was openly ridiculed in the press for his wanton destruction of the environment, although his trespass was inadvertent and caused no harm. Even a misdemeanor conviction carries a taint no innocent party should have to bear. How could any of us explain six months in jail to a young child or a friend or co-worker? It is both callous and ridiculous to treat any criminal violation as of little consequence and no grave harm to one's reputation. With respect to a special responsibility to protect the public, this factor simply does not apply to Unser's situation. He had no reason to believe his innocent outing would become life threatening and force him into a technical violation of the law.

This assessment demonstrates how unlikely it is that Congress ever intended to hold someone in Unser's position criminally liable without a proven criminal intent. The Tenth Circuit interpretation sweeps too widely. Virtually all of our criminal laws serve to protect public health and welfare. All of us are capable of unwitting acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would make criminals out of ordinary citizens.

Accordingly, the conclusion of this Court in *Morissette* has equal force here: "We think presumptive intent has no place in this case." *Morissette*, 342 U.S. at 275. To protect fundamental freedoms and reinforce the rule of law, this Court should grant the writ of certiorari and limit the lower court's expansive reading of the "public welfare offense" cases.

C. This Court's Holding in *Staples* Undercuts the Lower Court's Expansive Reading of the "Public Welfare Offense" Because This Court Will Not Infer from Silence That Congress Intended to Criminalize Apparently Innocent Conduct

The Tenth Circuit was so taken with the dicta of this Court's 1952 *Morissette* decision, that it all but ignored the more recent precedent of *Staples v. United States*, 511 U.S. 600. The point the lower court missed in *Staples* is that the innocence of the regulated conduct is a factor in defining a "public welfare offense."

In *Staples*, as in the present case, Congress was silent with respect to the *mens rea* element of a crime. Under The National Firearms Act, 26 U.S.C. §§ 5801-5872, the petitioner was convicted of possession of a "machine gun." The Act made it a crime, punishable by up to ten years in prison for any person to possess a firearm, including a "machine gun," that is not properly registered. Petitioner's unregistered gun met the definition of a "machine gun," but he argued his knowledge of the status of his gun must be proven. This Court agreed, holding:

> As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.

Staples, 511 U.S. at 619.

This common sense evaluation focused on the innocence of owning a gun where possession was a crime. The government argued Congress intended the Act to regulate and restrict the circulation of dangerous weapons and so falls under the "public welfare" rubric. This Court acknowledged, as it had in *Morissette*, that in some limited circumstances it had inferred

from silence that Congress did not intend to require proof of criminal intent to establish an offense. Such circumstances included, for example, the undocumented sale of narcotics (*United States v. Balint*, 258 U.S. 250) and the unregistered possession of grenades (*United States v. Freed*, 401 U.S. 601 (1971)). But this Court castigated the government for glossing over the distinction between grenades and guns, and ignoring "the particular care [the Court had] taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples*, 511 U.S. at 610 (citing *Liparota v. United States*, 471 U.S. 419 (1985)).

One case in which this Court took particular care was *Liparota v. United States*, 471 U.S. 419 (1985). In that case, this Court considered a statute that criminalized the unauthorized acquisition or possession of food stamps. No *mens rea* was mentioned. This Court held the statute required proof that the defendant knew his possession of food stamps was unauthorized, "largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts." *Staples*, 511 U.S. at 610. So it is in the present case. Unser's possession and operation of his snowmobile was both legal and innocent. The violation of the Wilderness Area regulation only came about by happenstance when Unser and his friend lost their way and wandered into the unmarked area in a snow storm. The Tenth Circuit ruling in this case results in the very evil this Court was trying to avoid in *Liparota*--outlawing apparently innocent acts.

> If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both

> the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emission levels, wholly unbeknownst to him, began to exceed legal limits between regular inspections.

Id. at 614.

Had this Court wanted to expand the reach of "public welfare offenses," it could have characterized the vehicle emission exceedence as such a crime and ignored Congress' silence regarding *mens rea*, as did the Tenth Circuit in this case. Instead, this Court stated it would hesitate--on the basis of silence--to find Congress intended to abrogate criminal intent for innocent parties.

But *Unser* presents even a stronger case for hesitation than this Court's hypothetical in *Staples*. Snowmobiles may be dangerous, but no more than cars and certainly less than guns. They are not as highly regulated as cars and Unser's entrance into the Wilderness Area under extremis and zero visibility conditions was wholly unbeknownst to him. If the lower courts don't hesitate to conclude on the basis of silence that Congress intended a prison term to apply to such a case, any conduct, no matter how innocent, could be brought within the embrace of a "public welfare offense."

But in *Staples* the government doggedly argued the National Firearms Act should be interpreted on the assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act." *Id.* at 610. In response, this Court declared that assumption is not supported by common experience and stated that guns, in general, are not "deleterious

devices or products or obnoxious waste materials" that put their owners on notice that they stand "in responsible relation to a public danger." *Id.* at 610-11. The government protested, however, that guns, unlike food stamps but like grenades and narcotics, are potentially harmful devices. This Court's answer is instructive:

> Under this view, it seems that *Liparota's* concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous--that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence.

Id. at 611.

If the innocent possession of a deadly gun does not qualify as a "public welfare offense," how could the innocent possession of a snowmobile in an unmarked forest? As this Court suggested, "a commonsense evaluation" of the nature of the regulated device and the expectations individuals have in dealing with the device, dictate such innocent conduct is not a "public welfare offense" for which this Court would infer from silence that Congress intended to do away with a guilty intent. Unser was indeed surprised, even amazed, that his possession of a snowmobile in a life or death situation was not an innocent act. At no time was Unser on notice that he stood "in responsible relation to a public danger" on a par with those who deal in

narcotics or possess hand grenades. Also, the lower court readily concedes that Unser's conduct "does not seem to seriously threaten a community's health or safety." *Unser*, 165 F.3d at 762-63.

Therefore, this Court's conclusion in *Staples* applies equally to this case:

> As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." ... We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as [the National Firearms Act].

Staples, 511 U.S. at 615-16.

This Court should grant the writ of certiorari and overturn the decision below. That decision expands "public welfare offenses" to include wholly innocent conduct.

CONCLUSION

In *Morissette*, this Court stated:

> This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to a jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

Morissette, 342 U.S. at 247.

That statement could be said of the present case. An otherwise "insignificant case" has been so litigated as to require, once again, an examination of some of the most fundamental concepts in criminal law. Over the past 47 years, the lower courts have taken this Court's acknowledgment of the "public

welfare offense" doctrine in *Morissette* to extremes, finding criminal even the most innocuous conduct. Without the intervention of this Court, the trend will continue at the cost of individual freedom and liberty--a price too high to pay for prosecutorial convenience. This Court should grant review and overturn the lower court decision.

DATED: May, 1999.

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No. 98-1600

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROBERT W. "BOBBY" UNSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted in support of the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit in *United States v. Robert W. "Bobby" Unser*, 165 F.3d 755 (10th Cir. 1999)[1,2].

This case involves interpretation of 16 U.S.C. §551, which authorizes the Secretary of Agriculture to make provisions for the protection of public forests and national forests and to make rules to regulate their use and occupancy and to preserve the forests from destruction, and makes a violation of the section punishable by fine or imprisonment. This case also involves the interpretation of 16 U.S.C. § 1133(c), which prohibits, inter alia, use of motor vehicles or motorized equipment or other form of mechanical transport in national forests. This case also involves 36 C.F.R. § 261.16(a) which prohibits in a National Forest Wilderness possessing or using a motor vehicle or motorized equipment (except as authorized by Federal Law or regulation).

Robert W. "Bobby" Unser was charged with and convicted in the United States District Court for the District of Colorado of unlawful possession and operation of a motor vehicle within a National Forest Wilderness area in violation of 16 U.S.C. §551 and 36 C.F.R. § 261.16(a). His conviction was upheld by the United States Court of Appeals for the Tenth Circuit in a decision dated January 4, 1999, reported in *United States v. Robert W. Unser*, 165 F.3d 755 (10th Cir. 1999). The Tenth Circuit affirmed the District Court's holding that violation of 16 U.S.C. § 551

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[1] Letters from petitioner consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

and 36 C.F.R. § 261.16(a) is a "public welfare offense" and that the prosection therefore did not have to prove *mens rea*[3].

Amicus respectfully urges the Court to grant the petition for a writ of certiorari.

INTEREST OF *AMICUS*

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, limited and responsible government and opposition to unnecessary interference by government with individual rights.

Atlantic Legal Foundation argues that the Tenth Circuit ignored the limitations articulated by this Court on inferring Congressional intent to eliminate *mens rea* as an element of a crime and the importance, also recognized by this Court, of limiting the "public welfare offense" exception to the requirement of proving *mens rea*.

The appearance of Atlantic Legal Foundation as *amicus curiae* in this case is desirable because we provide the Court with a public policy perspective on the dangers of loosely construing Congressional intent and broadening the scope of the "public welfare offense" exception to the requirement of proving *mens rea*.

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[3] The Tenth Circuit also held that the District Court did not err in ruling that the defendant had the burden of proof with respect to the necessity defense. We do not address that issue.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT RULING THAT VIOLATION OF 16 U.S.C. § 551 IS A "PUBLIC WELFARE OFFENSE" IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *STAPLES V. UNITED STATES.*

We respectfully submit that the Tenth Circuit's holding on the *mens rea* issue in this case is, by any fair reading of *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), in direct conflict with the jurisprudence of the Court.

The Government has argued, and the Tenth Circuit held, that this case fits in a line of precedent concerning what has been termed "public welfare" or "regulatory" offenses, in which Congress is said to have imposed a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, this Court has held that it is permissible to infer from statutory silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example this Court has held that the Narcotic Act of 1914, which was intended to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. See *United States v. Balint*, 258 U.S. 250 (1922). Similarly, in *United States v. Freed*, 401 U.S. 601 (1971) this Court held that possession of hand grenades was a "public welfare offense" that did not require proof of *mens rea*.

However, such public welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978). Typically, these statutes and the cases recognizing such offenses involve regulation of harmful or injurious items, such as drugs or "obnoxious waste materials". *See United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). In finding

or approving the use of the "public welfare offense" exception, this Court has relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with the *mens rea* requirement. See *Morissette v. United States*, 342 U.S. 246, 244-248[4].

Staples involved a semiautomatic rifle that could be converted to full automatic fire relatively easily (and had in fact been so converted). This Court held that guns were not the sort of inherently dangerous device that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of a law that criminalized the possession of certain types of guns. We submit that if guns are not inherently dangerous devices, *a fortiori* snowmobiles cannot be considered the sort of dangerous device or substance which puts its owner or operator "on notice" that something analogous to "strict liability" adheres to its possession or use[5].

Snowmobiles are not "deleterious devices or products or obnoxious waste materials," *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) that put their owners on notice that they stand

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[4] In describing the parameters of public welfare offenses, this Court has required at least that the defendant know that he or she is dealing with some dangerous or deleterious substance, so as to avoid "construing criminal statutes to impose a rigorous form of strict liability." See *Staples*, 114 S.Ct. at 1798, fn3.

[5] While we are aware that the Court has pointed out that the term "strict liability" is really a misnomer (see Staples. 114 S.Ct. at 1798, fn3), we use that term because it is more commonly understood by laymen who are likely to run afoul of such laws than are the Latin terms "*mens rea*" or "*scienter*."

in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)[6].

As this Court wisely wrote in *Staples*, if we were to accept as a general rule the government's suggestion that dangerous or regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results.

Here, however, the government cannot argue that even if the item -- a snowmobile -- is inherently innocuous, the activity in which Unser and his friend were engaged somehow endangered public health or safety because of the manner in which they were using the device. Very significantly, in this case, the government has conceded that the conduct in question does not seriously threaten a community's health or safety: it stated in its brief below:

> Admittedly, it is difficult [to] characterize the use of motorized vehicles in a wilderness area as conduct "that may seriously threaten a community's health or safety."

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[6] The Tenth Circuit's holding cannot even be squared with the *dissent* in *Staples*. In that case, Justice Stevens recognized the requisites for finding a "public welfare offense" exception:

> "Public welfare" offenses share certain characteristics: (1) they regulate "dangerous or deleterious devices or products or obnoxious waste materials," (2) they "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare," and (3) they "depend on no mental element but consist only of forbidden acts or omissions." Examples of such offenses include Congress' exertion of its power to keep dangerous narcotics, hazardous substances, and impure and adulterated foods and drugs out of the channels of commerce.

Staples, 511 U.S. at 628-629 (citations and footnotes omitted). Those three criteria are conjunctive, and clearly the use of a snowmobile simply does not satisfy two of the three criteria.

Brief of United States below at 14 (quoting *Liparota v. United States*, 471 U.S. 419, 433 (1985). *See United States v. Unser*, 165 F.3d 755, at 763 (10th Cir. 1999).

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state -- ignorance of their precise location with reference to the boundaries of a national forest -- makes their actions entirely innocent.

As this Court held in *Staples*, it is unthinkable, and we submit dangerous to conclude, that Congress intended to subject law-abiding, well-intentioned citizens to possible imprisonment for a commonplace and apparently innocent and activity.

II. THE DOCTRINE OF "PUBLIC WELFARE OFFENSE" SHOULD BE NARROWLY CONSTRUED

As this Court noted in *Staples*, the obvious effect of eliminating the *mens rea* requirement is to make it easier for the prosecution to obtain a criminal conviction. 511 U.S. at 615; citing *Morissette*, 342 U.S. at 263. This Court has quite rightly been reluctant to impute that purpose to Congress where, as here, it would ease the path to convicting persons whose conduct would not alert them to the probability of strict regulation in the form of a statute such as 16 U.S.C. § 551.

In *Staples*, this Court held that when a statute is silent with respect to Congressional intent to dispense with the element of *mens re* or *scienter*, or when the language of the statute is ambiguous in that regard, "we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded." *Staples*, 511 U.S. at 605. The requirement of proving *mens rea* is an essential principle of Anglo-American criminal jurisprudence. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978).

In *Morissette v. United States*, 342 U.S. 246, 250 (1952), this Court held that:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

These observations are important, and signal an appreciation for the dangers to liberty of permitting a loosening of the level of scrutiny the courts should employ in determining whether Congress intended to dispense with criminal intent as an element of a crime.

We submit that it is also important to note the risk in giving Congress license to create "public welfare offenses" as a means of social control. The Tenth Circuit, quoted the following from *Morissette*:

> While such [public welfare] offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent

> as dispensing with it and holding that the guilty act alone makes out the crime.

Morissette, 342 U.S. at 255-56.

This language, unless severely constrained to apply only to situations in which public health and safety are imminently and seriously threatened, make it all too likely that the legislative branch would, out of a desire to accomplish what it perceived to be an important social objective, "subject law-abiding, well-intentioned citizens" to possible imprisonment for commonplace and apparently innocent activities.

The notion that a comparatively mild penalty (such as a modest fine and a "short time" in prison") should be a significant consideration in determining whether the statute should be construed as dispensing with *mens rea* is pernicious. In examining the characteristics of the public welfare offense, this Court has included in its consideration the punishment imposed and have noted that the penalties commonly are relatively small, "and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U.S., at 256, 72 S.Ct., at 246. In *Staples*, this Court noted that the crime was a felony, a term that has a particularly odious meaning. *Staples*, 511 U.S. at 617-618.

We respectfully submit that the Court should take notice of the fact that even conviction on a federal misdemeanor charge carries with it a severe burden. Such a conviction will likely impede, if not prevent altogether, gaining or changing employment, or obtaining credit (such as a mortgage, bank loan or credit card), essential life activities[7]. While there surely is a difference between five years imprisonment and six months jail time, prison conditions are such that it is not unreasonable to anticipate that an "ordinary law-abiding, well-intentioned citizen" could be abused and traumatized by even the "relatively small," penalty of a short

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[7] Many employment applications ask whether the applicant has been convicted of a "crime," and do not differentiate between a "felony" or a "misdemeanor." Many credit applications as the same question, make no distinction between the severity of the crime.

prison sentence and that a conviction of any crime "gravely besmirch[es}" the defendant's reputation. *Cf. Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960).

The common law was, in the absence of a written constitution, an Englishman's protection against tyranny. We have improved upon the English model, but common law tradition remains a bulwark against prosecutorial abuse or excessive enthusiasm.

As this Court noted in *Morissette*, and restated in *Staples*, the principle of requiring *mens rea* as an element of criminal conviction and punishment "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

We respectfully submit that this Court should take the opportunity presented by this petition for certiorari to reiterate those important principles of individual liberty and responsibility.

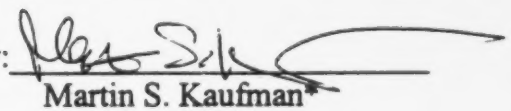
CONCLUSION

For the foregoing reasons, we urge the Court to grant the petition for a writ of certiorari.

Dated: April, 1999

Respectfully submitted,

Atlantic Legal Foundation, Inc.

By: 

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No. 98-1600

In the Supreme Court of the United States

ROBERT W. "BOBBY" UNSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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APP

QUESTIONS PRESENTED

1. Whether the regulatory offense of operating a snowmobile in a National Forest Wilderness Area, in violation of 16 U.S.C. 551 and 36 C.F.R. 261.16(a), requires proof that the defendant knew he was in such a wilderness area.

2. Whether, assuming that a defense of necessity is permitted for the regulatory offense in this case, the burden of proof for that defense may be placed on the defendant.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 165 F.3d 755.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1999. The petition for a writ of certiorari was filed on April 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of Colorado, petitioner was convicted of unlawful operation of a snowmobile within a National Forest Wilderness Area, in violation of 16 U.S.C. 551 and 36 C.F.R. 261.16(a). He was fined

$75.00. Pet. App. 32-34. The court of appeals affirmed. Pet. App. 1-29.

1. On December 20, 1996, petitioner and a friend, Robert Gayton, were operating their snowmobiles in the San Juan Range of the Rocky Mountains near La Manga Pass in southern Colorado. Pet. App. 3. Mr. Gayton was a completely inexperienced snowmobiler, who relied upon petitioner and followed his lead. *Ibid.* The men drove their snowmobiles into a National Forest Wilderness Area, where Mr. Gayton's snowmobile became stuck in a small ravine and had to be abandoned. *Id.* at 3, 13. After Mr. Gayton's snowmobile became stuck, strong winds whipped the snow on the ground into a "ground blizzard" that created a hazardous situation for the men. *Id.* at 4. They sought to find the way back to safety on the remaining snowmobile until it became inoperable. *Ibid.* They continued traveling on foot. By fortune and fortitude, they survived two nights in the wilderness before finding safety in a barn, from which they were rescued. *Ibid.*

2. Petitioner was charged under 16 U.S.C. 551 with violating 36 C.F.R. 261.16(a). Section 551 authorizes the Secretary of Agriculture to promulgate regulations for public forests and national forests "to regulate their occupancy and use" and makes a violation of any such regulation a Class B misdemeanor punishable by imprisonment up to six months and a fine up to $5,000.[1]

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[1] Section 551 provides:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the

See 18 U.S.C. 3571(b)(6), 3581(b)(7). A statute specifically dealing with federal wilderness areas provides that "there shall be * * * no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, [and] no other form of mechanical transport" in wilderness areas. 16 U.S.C. 1133(c). The pertinent regulatory provision, 36 C.F.R. 261.16, provides that "[t]he following are prohibited in a National Forest Wilderness: (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation."

Petitioner argued that, in order to convict him, the government had to prove not only that he was operating a snowmobile in a National Forest Wilderness, but also that he knew that he was operating it in a National Forest Wilderness. The district court rejected that argument, ruling that "there is no *mens rea* element to the offense." Pet. App. 35; see also *id.* at 41. The district court ruled, however, that it would recognize a defense of necessity, if "there was no legal alternative of which the defendant knew or should have known at the time to violating the law," if "the harm to be prevented was imminent," and if "a direct causal relationship is reasonably anticipated to exist between defendant's actions and avoidance of the harm." *Id.* at 43. The court stated that, because "there is no *mens rea* element to the government's burden of proof * * *, the burden of establishing this [necessity] defense by a

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forests thereon from destruction; and any violation of the provisions of this section * * * or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both.

The maximum fine has been increased to $5,000 by 18 U.S.C. 3571(b)(6).

preponderance of the evidence falls to [petitioner]." *Id.* at 41.

The trial court made detailed findings of fact. Pet. App. 35-44. The court found that Mr. Gayton's snowmobile—the first snowmobile lost—was found "well within the boundary of the wilderness area." Pet. App. 37. The court also found that petitioner had abandoned his own snowmobile, an "Arctic Cat" model, "well within the boundary of the wilderness area," *ibid.*, rejecting petitioner's argument that someone had moved it from the place where he had abandoned it. See also *id.* at 40 ("I conclude that the government has established beyond a reasonable doubt that * * * [petitioner] operated a motor vehicle within the boundaries of the San Juan Wilderness area without authorization by federal law or regulation.").

With respect to petitioner's necessity defense, the court found that petitioner and Gayton entered the wilderness area while they were still engaged in recreational use of their snowmobiles and before the storm arose. Pet. App. 42. The court was "not satisfied that a true emergency arose until [the] time either just before or just after Mr. Gayton's machine got stuck." *Ibid.* Since that machine was abandoned well within the boundaries of the wilderness area, the court stated that it "would * * * find and conclude that [the necessity] defense is not available because the offense charged here was in fact committed before the emergency sufficient to give rise to such a defense occurred." *Id.* at 44. The court added that petitioner himself had been "responsible for placing [him]self in the position of violating the criminal statute." *Ibid.* The court also found that maps giving the precise location of the wilderness area were readily available "all over the place," and that "anybody recreating where there is a wilder-

ness area nearby simply ought to use one of these maps." *Ibid.* The court stated that "[c]learly a use of [such maps] would have prevented this from happening at all." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-29. The court upheld the district court's determination that the regulatory violation was a strict-liability offense. The court first noted that neither 16 U.S.C. 551, the authorizing legislation, nor 36 C.F.R. 261.16, the regulatory prohibition, contains a mens rea requirement. Pet. App. 14-15. Applying the reasoning of *Morissette* v. *United States*, 342 U.S. 246, 255-256 (1952), the court concluded that the regulation described a "public welfare" offense for which strict liability was permissible. Pet. App. 15-18. The court was satisfied that, construed as a strict-liability offense, the regulation imposes a reasonable duty of compliance, the offense is not one derived from a common-law crime, strict liability is supported by the underlying congressional purpose for the regulation, conviction does not impose any significant stigma on the defendant, and the penalty is relatively small. Pet. App. 18-20. The court also observed that similar Forest Service regulations had been held in other cases to proscribe public welfare offenses for which strict liability was the standard. Pet. App. 18, citing *United States* v. *Kent*, 945 F.2d 1441, 1446 (9th Cir. 1991) (unauthorized occupancy of National Forest land); *United States* v. *Larson*, 746 F.2d 455, 456 (8th Cir. 1984) (trespass by cattle); *United States* v. *Wilson*, 438 F.2d 525 (9th Cir. 1971) (cutting wood); *United States* v. *Northwest Pine Products, Inc.*, 914 F. Supp. 404, 407- 408 (D. Or. 1996) (timber operations).

The court also upheld the district court's allocation to petitioner of the burden of proof of his necessity defense. The court recognized that, "when evidence has

been produced of a defense which, if accepted by the trier of fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense." Pet. App. 21-22. But the court also recognized that "[t]he Constitution *permits* allocation of the burden of proof to the defendant with respect to a defense which does not negate an element of the crime." *Id.* at 22. The court stated that the issue of the burden of proof with respect to a necessity defense is not directly addressed by the statutes or regulations at issue. *Id.* at 23. The court noted, however, that "it is the defendant who is most likely to have access to the facts needed to prove [a necessity] defense" and that "[i]t would be impractical * * * to impose on the government the burden of disproving necessity beyond a reasonable doubt." *Id.* at 23. Accordingly, the court held that the district court properly ruled that "[petitioner] had the burden of proving the defense of necessity." *Id.* at 24.

ARGUMENT

1. a. The court of appeals' holding that Section 551 and the Forest Service regulations permit conviction without proof of *mens rea* is correct. In *Morissette* v. *United States*, 342 U.S. 246 (1952), this Court recognized the existence of numerous statutes and administrative regulations defining what have been called "public welfare offenses" that impose strict liability without regard to the intent of the violator:

> Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury

> to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.

342 U.S. at 255-256. Quoting Judge, later Justice, Cardozo, the Court distinguished such regulatory offenses from "infamous crimes," which ordinarily require "[t]he element of conscious wrongdoing, the guilty mind accompanying the guilty act." *Id.* at 257 (quoting from *Tenement House Dep't* v. *McDevitt*, 109 N.E. 88, 90 (N.Y. 1915)). The Court recognized that, for such regulatory offenses, "penalties serve as effective means of regulation" and such an offense "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." 342 U.S. at 259-260, (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 280-281, 284 (1943)).

In *Morissette*, the Court noted that public welfare offenses generally share certain characteristics. First, "[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." 342 U.S. at 256. In addition, "penalties [for such offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Ibid.*

b. The court of appeals correctly held that operating a motor vehicle in a designated wilderness area is a "public welfare offense" that dispenses with the need to prove *mens rea*, as explained in *Morissette*. Indeed, as the Court noted in *United States* v. *Feola*, 420 U.S. 671, 690 (1975), "[t]raffic violations generally fall into that category of offenses that dispense with a *mens rea* requirement." This offense, like many other motor vehicle offenses, has all the characteristics of a public welfare offense identified in *Morissette*. First, the prohibition merely requires a person operating a motor vehicle near a designated wilderness area to take care to ascertain his location and ensure that it is not within the boundaries of a wilderness area. See Pet. App. 18 ("[T]he duty imposed is reasonable, under the circumstances, and adherence is properly expected."), 44 (noting that "anybody recreating where there is a wilderness area nearby simply ought to use one of these [readily available] maps"). Second, like other motor vehicle offenses, operating a motor vehicle in a designated wilderness area subjects the offender to a penalty (a maximum of six months' imprisonment and a $5,000 fine) that is "relatively small," especially in comparison with the "heavier sentences of imprisonment and fines" that are "common" in today's criminal codes. *Id.* at 19-20. Indeed, petitioner's actual penalty of a $75 fine and no imprisonment, which is apparently common in such cases, see *id.* at 46-47, emphasizes the modest nature of the penalty. Third, as the court of appeals noted, "conviction does not gravely besmirch one's reputation." Pet. App. 18-19.[2]

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[2] Petitioner argues (Pet. 28-29) that "the Tenth Circuit erred in finding that 'conviction [of operating a snowmobile in a wilderness area] does not gravely besmirch' [petitioner's] reputation." The

In addition to the above factors, the court of appeals noted that other factors also support classifying the offense at issue here as a public welfare offense. There is no mention of intent in the statute or regulations. See Pet. App. 14-15. In addition, the offense itself does not employ the terms of, or otherwise derive directly from, any common law crime that itself requires intent, and Congress's purpose to protect wilderness areas from the irreparable damage that can be caused by motor vehicles supports construing the offense as a public welfare offense. See *id.* at 18 ("[T]he statutory scheme is not one taken from the common law and congressional purpose is supportive."); see also *Morissette*, 342 U.S. at 261-262; *Neder* v. *United States*, No. 97-1985 (June 10, 1999), slip op. 19-20.

2. Contrary to petitioner's contention (Pet. 11-17), the court of appeals' conclusion that the offense at issue here does not require proof of *mens rea* does not conflict with any decision of this Court.

a. In *Liparota* v. *United States*, 471 U.S. 419 (1985), the Court interpreted a statute proscribing food-stamp fraud, 7 U.S.C. 2024(b)(1) (1982), which provides that "whoever knowingly uses * * * [food stamps] in any manner not authorized by [law]" was guilty of a felony if the value of the food stamps was $100 or more. The Court held that the express statutory intent

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fact that petitioner's personal fame as a race car driver made his efforts to avoid conviction in this case a subject of news reports, see *id.* at 29 n.14, is of no relevance to the Tenth Circuit's statement that the offense itself does not besmirch the character of the violator in the way that conviction of many much more serious criminal offenses would. In any event, the headlines quoted by petitioner reflect criticism of petitioner's refusal to accept responsibility for his conduct; they do not suggest that the infraction itself reflects poorly on petitioner's character.

requirement ("knowingly") applies not only to the "use" of the food stamps, but also to the element that the use was in a "manner not authorized" by law. 471 U.S. at 423-434. Rejecting the argument that Congress intended to dispense with a *mens rea* requirement, the Court observed that "[i]n most previous instances [of offenses dispensing with *mens rea*], Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.* at 433.

The conclusion that the offense at issue in this case does not require proof of *mens rea* is entirely consistent with the Court's decision in *Liparota*. The statute in *Liparota* specified that the offense must be committed "knowingly," and the Court concluded that the use of that term indicated a requirement that the violator know that his use of the food stamps was "in any manner not authorized by [law]." In this case, by contrast, both the statute and the regulation are silent with respect to intent. Moreover, this statute is unlike the statute at issue in *Liparota* in two other critical respects. First, the penalty for the violation in this case (a maximum of six months' imprisonment and a $5,000 fine) is far less than the penalty for food-stamp fraud in *Liparota* (a maximum penalty of five years' imprisonment and a $10,000 fine). Second, motor-vehicle offenses such as the one in this case have long been held to be public-welfare offenses that require no proof of *mens rea*, see *Feola*, 420 U.S. at 690; Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73, 84 (1933), whereas the food-stamp fraud offense in *Liparota* falls within no such generally accepted category of public welfare offenses.

b. The decision of the court of appeals is also entirely consistent with *Staples* v. *United States*, 511 U.S. 600 (199⁄). In that case, the Court held that a person may not be convicted of possessing an unregistered machinegun, in violation of 26 U.S.C. 5861(d), without proof that he knew that the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. 511 U.S. at 604-619. *Id.* at 616. The Court in *Staples* specifically noted that "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 616. The firearms statute at issue in *Staples* provides for a maximum penalty of ten years' imprisonment, see *ibid.*, and that penalty strongly supported a requirement of *mens rea*. In this case, by contrast, the maximum term of imprisonment is six months and offenders like petitioner are typically assessed a fine of $75 and no imprisonment.[3] Those penalty provisions point in the opposite direction from the provision in *Staples*, supporting the court of appeals' conclusion that the offense here is a public welfare offense that does not require proof of intent. In addition, as noted above, the motor-vehicle offense at issue in this case, unlike the firearms offense in *Staples*, falls within a well- recognized category of public welfare offenses that dispense with a *mens rea* requirement.

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[3] The misdemeanor penalties authorized by Section 551 are roughly equivalent to the penalties that the Court in *Staples* cited as being consistent with public welfare offenses that dispense with a *mens rea* requirement. See 511 U.S. at 616 (citing *Commonwealth* v. *Raymond*, 97 Mass. 567 (1867) (crime involving a penalty of a "fine up to $200 or six months in jail, or both")).

3. The holding of the court of appeals regarding the elements of the offense for which petitioner was convicted does not conflict with any decision of any other court of appeals.

a. Petitioner contends (Pet. 20-24) that the decision in this case conflicts with the Ninth Circuit's decisions in *United States* v. *Semenza*, 835 F.2d 223 (1987), and *United States* v. *Launder*, 743 F.2d 686 (1984). That contention is mistaken.

In *Semenza*, the defendant was charged under Section 551 with "[p]lacing or allowing unauthorized livestock to enter or be in the National Forest System," in violation of 36 C.F.R. 261.7(a). In *Launder*, the defendant was charged with violating 18 U.S.C. 1856, which provides that "[w]hoever, having kindled * * * a fire in or near [federal land] * * * permits or suffers said fire to burn or spread beyond his control" shall be subject to six months' imprisonment and a fine. In each case, the Ninth Circuit held that the operative terms of the prohibitions ("placing or allowing" in *Semenza*, "permits or suffers" in *Launder*) require "a willful act or a willful failure to act in the face of a clear opportunity to do so." *Semenza*, 835 F.2d at 224; *Launder*, 743 F.2d at 689.

The prohibition at issue here, by contrast, does not contain terms like "allow" or "permit," which may be construed to require proof of willful action. Instead, Section 261.16(a) prohibits "[p]ossessing or using" a snowmobile or other motorized equipment within a wilderness area—terms that do not necessarily connote any mental state other than the voluntariness of

possession or use.[4] The Ninth Circuit itself, in *United States* v. *Kent*, *supra*, held that its holdings in *Semenza* and *Launder* depended on the presence of the particular terms that defined the offenses in those cases. In *Kent*, which involved a prosecution under Section 551 for violating a regulation prohibiting "using National Forest System lands for residential purposes,".36 C.F.R. 261.10(b), the court explained that the language of that regulation, unlike the language of the regulations at issue in *Semenza* and *Launder*, "speaks solely of action, with no reference to volition," and that it would therefore be inappropriate to construe the regulation to require proof of *mens rea*. 945 F.2d at 1446. The same conclusion follows here. See also *United States* v. *Wilson*, 438 F.2d 525 (9th Cir. 1971).

b. Petitioner also contends (Pet. 24-25) that the court of appeals' holding conflicts with the Fourth Circuit's decision in *United States* v. *Wilson*, 133 F.3d 251 (1997). In that case, the Fourth Circuit interpreted a provision of the Clean Water Act, 33 U.S.C. 1319(c)(2)(A), which provides that "[a]ny person who knowingly violates section 1311" commits a felony. The court held that the explicit statutory intent requirement ("knowingly") applied to all elements of the offense and required "defendant's knowledge of facts meeting each essential element of the substantive offense." 133 F.3d at 262 (emphasis omitted). The offense at issue here differs from that in *Wilson* in that the regulation defining the offense here does not use the term "knowingly," the offense itself is a misdemeanor with a relatively short maximum sentence, and

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[4] As noted above, although the felony firearms offense in *Staples* was also a possessory offense, the severe penalties proscribed for violations suggested that proof of *mens rea* was necessary.

the offense falls within a recognized category of offenses (motor vehicle offenses) that require no *mens rea*. The decision of the Tenth Circuit does not conflict with the Fourth Circuit's decision in *Wilson*.[5]

4. Petitioner argues (Pet. 17-20) that it was unconstitutional for the court of appeals to place upon him the burden of proving the defense of necessity that the district court ruled would be available to him. That argument is mistaken.

In *Patterson* v. *New York*, 432 U.S. 197 (1977), this Court held that it does not violate the Due Process Clause to impose on a defendant the burden of persuasion for a defense that does not negate any element of the offense. 432 U.S. at 205-211. Petitioner accepts that proposition, Pet. 18-19, but argues that *Patterson* applies only when the defense is specified by statute and not when it is of judicial creation. Nothing in *Patterson* suggests that the source of the defense is material; the material feature for burden-shifting is that the defense did not negate any element of the offense, which is the case here.

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[5] Petitioner argues (Pet. 25-29) that the court of appeals' decision in this case is inconsistent with the decision in *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960) (Blackmun, J.). In *Holdridge*, defendants were charged with violating a provision of 18 U.S.C. 1382 providing that "[w]hoever reenters or is found within any [federal military installation] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof" is guilty of a misdemeanor. The Eighth Circuit ruled that Section 1382 defines a strict liability offense and it would be inappropriate to infer a *mens rea* requirement that was not expressed in the terms of the statutory provision. 282 F.2d at 308-310. The Tenth Circuit's decision in this case reaches the same result, and it accordingly does not conflict with *Holdridge*.

Petitioner asserts (Pet. 19-20) that the court of appeals' holding that petitioner bears the burden of proving the defense of necessity conflicts with *United States* v. *Talbott*, 78 F.3d 1183 (7th Cir. 1996). In that case, the Seventh Circuit held that, absent express statutory direction, the burden of proof presumptively lies with the government on a defense, even where the Constitution would permit it to be imposed on defendant. 78 F.3d at 1186. *Talbott* involved the burden of proof of the defense of self-defense to the charge of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1).

The rule of statutory construction applied in *Talbott* has been developed and applied only in cases involving serious felonies. See 78 F.3d at 1186 (citing cases). We have found no case, and petitioner has not cited any, applying that rule of construction to defenses to strict-liability public welfare offenses. With respect to such offenses, the court of appeals correctly held that the fact that the defendant "is most likely to have access to the facts needed to prove [a] defense [of necessity]," Pet. App. 23, is a sufficient basis to infer that Congress would not have wanted to place the burden of proof with respect to that defense on the government.[6]

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[6] With respect to the necessity defense, petitioner repeatedly argues (Pet. 6-7, 15-16) that his control of the snowmobile was impaired by extreme weather conditions before he entered the federal wilderness area. The district court, however, made a factual finding, affirmed by the court of appeals, that the difficult weather conditions did not arise until after petitioner had entered the wilderness area, and it rejected petitioner's necessity defense on that basis. See Pet. App. 44 ("the offense charged here was in fact committed before the emergency sufficient to give rise to such a defense occurred").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 98-1600

In The

Supreme Court of the United States

ROBERT W. "BOBBY" UNSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person can be convicted of a crime without proof of *mens rea*:

   A. In the absence of a clear indication on the part of Congress to dispense with the *mens rea* requirement; and

   B. When the crime does not satisfy the requirements for a "public welfare offense" as established by *Morissette v. United States*, 342 U.S. 246 (1952), and its progeny?

2. Whether a court may shift the burden of proof of an affirmative defense to the defendant in the absence of an Act of Congress authorizing that shift without violating the Due Process Clause of the Fifth Amendment?

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INTRODUCTION

The United States Court of Appeals for the Tenth Circuit, *United States v. Unser*, 165 F.3d 755, 757 (10th Cir. 1999), best characterized the nature of this case:

> This case arises from a story of survival in the wilderness under extreme conditions and involves legal issues requiring examination of some of the most fundament concepts in criminal law. Like the parties obviously do, we view the case as having significance beyond the penalty actually imposed.

Regrettably, the opinion that follows this trenchant statement conflicts with this Court's holdings as to *mens rea*. Worse yet, as Respondent's brief reveals, Respondent asks this Court to look the other way as federal officials read *mens rea* out of almost every federal statute, particularly federal statutes that relate to "protecting the environment."

What is at stake here is nothing less than "first principles":

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequence ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250 (1952).

In light of the threat to these first principles posed by the Tenth Circuit's ruling and by Respondent's view as to when *mens rea* is required, Mr. Unser's petition should be granted.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MORISSETTE v. UNITED STATES*.

Respondent asserts that Mr. Unser was convicted properly of a "public welfare offense." Brief in Opp. at 6-9. However, Respondent misstates the crimes for which *mens*

rea is required and misconstrues this case to bring it into compliance with *Morissette*. Respondent's disingenuous argument must be rejected.

A. *Mens Rea* Is Not Reserved For "Infamous Crimes."

Respondent asserts that, unlike "infamous crimes," "public welfare offenses" do not require proof of *mens rea*. To the contrary, as this Court held in *United States v. Balint*, 258 U.S. 250, 251 (1922), "[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime . . . " Furthermore, this Court has held that strict liability is the exception, not the rule, and *mens rea* will not be read out of a statute without the express intent of Congress. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978);[1] *Staples v. United States*, 511 U.S. 600, 620 (1994).[2] Respondent's argument that *mens rea* is only for "infamous crimes" finds no support in this Court's opinions and must be rejected.

B. This Is Not A Public Welfare Offense.

Respondent cites *Morissette* as to "public welfare offenses" and attempts, unsuccessfully, to force the square peg of this case into the round hole of that offense. Brief in Opp. at 6-8.

- Respondent asserts that, unlike common law crimes, public welfare offenses do not involve "invasions;" however, the offense here is the invasion of a wilderness area.
- Respondent asserts that public welfare offenses create a "danger or probability of [danger]" of

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[1] "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.*, *quoting Dennis v. United States*, 341 U.S. 494, 500 (1951).

[2] "[I]f Congress had intended to [eliminate *mens rea*], it would have spoken more clearly to that effect." *Id.*

"direct or immediate injury to person or property;" however, the offense here creates no such danger to "person or property."

- Respondent asserts that public welfare offenses require only "reasonable" "care" and "exertion;" however, the offense here imposes demands that are unreasonable in a blinding blizzard with zero visibility!
- Respondent asserts that public welfare offenses impose "relatively small" penalties that do "no grave damage" to one's reputation; however, the offense here carried penalties of six months in jail and public disgrace as an "environmental criminal."

Respondent's attempt to characterize the offense here as a "traffic violation" fails because the federal statutes at issue control the "occupancy and use," by motor vehicles, of federal land designated as wilderness to ensure their "solitude." Thus, these statutes are not traffic laws in any true sense of those words, for which proof of *mens rea* is not required, but trespass laws, for which the common law required proof of *mens rea*. Moreover, Respondent's analysis of the offense here as a "traffic violation" is alternately arrogant and absurd.

Respondent asserts that a wilderness boundary in snow-covered Colorado high country is comparable to the double yellow line down the middle of an asphalt highway that one may avoid crossing with a modicum of effort. Respondent's assertion is absurd:

- The wilderness area at issue here, like most wilderness areas, has no on-the-ground markers in the summer, let alone in the winter, when any signs are buried in snow.
- Although the boundary of the wilderness area at issue here is marked on federal maps, ascertaining one's position, as well as the boundary on the ground, requires identification of features that are buried or obscured by deep snow.

- At the time of Mr. Unser's near-death experience, high winds and blowing and drifting snow reduced visibility to zero, making any attempt to use a map impossible.

Respondent asserts that the penalty faced by Mr. Unser is "relatively small" compared to "heavier sentences" that are "common." Respondent's assertion is arrogant:

- The question is not whether the penalty was "relatively small," compared with rape, arson, and murder, but was the penalty "severe." *Staples*, 511 U.S. at 618.
- Respondent's assertion that six months in a federal prison is "modest" is brazen and contrary to this Court's holdings. *Id.* at 635. Public welfare offenses provide "for only light penalties . . . not imprisonment in the state penitentiary." *Id.* at 616.
- Mr. Unser was charged in the Information with the felony of aiding and abetting his friend in violating the Wilderness Act. This Court has suggested that a felony may never be a public welfare offense. *Staples*, 511 U.S. at 618.

Respondent asserts that Mr. Unser's conviction does not "gravely besmirch [his] reputation." Respondent's assertion is absurd:

- The question is not whether conviction of rape, arson, or murder would besmirch Mr. Unser's reputation more seriously, but whether conviction of an environmental crime besmirches his reputation. Mr. Unser's reputation has been besmirched.
- Respondent's assertion that Mr. Unser's reputation has suffered only as a result of his "refusal to accept responsibility for his conduct" (being lost in a blizzard?), but not as a result of his conviction, is droll. Mr. Unser's reputation has suffered.

- Conviction as a "welfare cheat" may be less damaging to one's reputation than conviction for rape, arson, or murder, but it did not prevent this Court from requiring *mens rea* in *Liparota v. United States*, 471 U.S. 419 (1985).

Respondent's attempt to characterize the offense here as a traffic violation and otherwise consistent with this Court's holdings in *Morissette* and its progeny must be rejected.

C. The Tenth Circuit's "Other Factors" Conflict With This Court's Holdings.

Respondent asserts that because "[t]here is no mention of intent in the statute or regulations" the offense here is a "public welfare offense." Brief in Opp. at 9. Yet silence is not enough to read *mens rea* out of a statute. "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* . . . " *Staples*, 511 U.S. at 606, *citing Liparota*, 471 U.S. at 426; *United States Gypsum Co.*, 438 U.S. at 438; *Morissette*, 342 U.S. at 263.

Respondent asserts that because the offense here "does not employ *the terms of*, or otherwise derive *directly from*, any common law crime that itself requires intent," *mens rea* is not an element. Brief in Opp. at 9 (emph. added). Yet this Court has never required that a statute "employ the terms of" or "derive directly from" a common law crime to be subject to "the general rule at common law . . . that the scienter [is] a necessary element in . . . every crime . . . " *Morissette*, 342 U.S. at 258. Rather, this Court distinguishes between an act of Congress "merely adopting into federal statutory law *a concept of crime* already so well defined in common law and statutory interpretation by the states" and one "creating *an offense new to general law*, for whose definition the courts have no guidance except the Act." *Id.* at 262 (emph. added).

Because the "concept of crime" here is trespass and "well defined in common law," *mens rea* is required.[3]

Respondent asserts that because Congress sought to "protect wilderness areas from the *irreparable damage* that can be caused by motor vehicles," the offense here is a "public welfare offense." Brief in Opp. at 9 (emph. added). Yet Congress sought not to prevent "irreparable damage," but to ensure that wildernesses would remain areas "where the earth and its community of life are untrammeled by man" so as to "retain [their] primeval character and influence [with] outstanding opportunities for solitude. . . . " Wilderness Act of 1964, 16 U.S.C. § 1131(c). While a snowmobile may disturb the "solitude," it will not "damage" the wilderness area, buried beneath feet of snow, nor will the disturbance be "irreparable." Even if Respondent's view of the goal of Congress were true, it would not provide the intent to eliminate *mens rea* from that offense.

Respondent's attempt to justify the Tenth Circuit's "other factors" must be rejected.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LIPAROTA v. UNITED STATES*.

Respondent asserts that the Tenth Circuit's holding is not in conflict with this Court's holding in *Liparota v. United States*, 471 U.S. 419 (1985). However, Respondent sets forth, not this Court's holding as to why the statute at issue was not a "public welfare offense," but its own rationale. Brief in Opp. at 9-10. Respondent's rewrite of *Liparota* must be ignored.

In *Liparota*, this Court rejected the Government's argument that the offense was a "public welfare offense" because that offense "differs substantially from those 'public welfare offenses' we have previously recognized." *Id.* at 432-433. As

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[3] "[In] *[t]respass quare clausum fregitis* . . . the defendant was called upon to show why he broke . . . the real or imaginary structure inclosing the land. . . . " *Black's Law Dictionary*, 1951.

to the nature of that difference, this Court explained, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulations and may seriously threaten the community's health or safety."[4] *Id.* at 433. Thereupon, the Court set forth its holding in a case involving unregistered hand grenades: "[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*, *quoting United States v. Freed*, 406 U.S. 601, 609 (1971). In conclusion, this Court declared, "A food stamp can hardly be compared to a hand grenade . . . nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs . . . " *Liparota*, at 433.

This Court's holding in *Liparota* may be paraphrased: "A [snowmobile] can hardly be compared to a hand grenade . . . , nor can the unauthorized [possession and use of a snowmobile] be compared to the selling of adulterated drugs . . . " Clearly the Tenth Circuit's holding is in conflict with this Court's holding in *Liparota*.

III. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *STAPLES v. UNITED STATES*.

Respondent asserts that the Tenth Circuit's holding is not in conflict with this Court's holding in *Staples*, 511 U.S. 600 (1994), by setting forth, not this Court's holding, but Respondent's own rationale. Brief in Opp. at 11. Thus, Respondent asserts that *Staples* turned on the penalty because that was done "[h]istorically." *Id.* at 616. But this Court rejected "such a definitive rule of construction" and relied instead on "a common-sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectation that individuals may legitimately have in dealing with the regulated items." *Id.* at 619.

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[4] The Tenth Circuit acknowledged that Mr. Unser's alleged crime posed no threat to public health and safety. *United States v. Unser*, 165 F.3d 755, 762-63 (10th Cir. 1999).

Contrary to Respondent's assertion, this Court did not "delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." *Id.* at 619, *quoting Morissette*, 342 U.S. at 260. In fact, this Court's recognition that there is no "comprehensive criteria" for determining when *mens rea* applies gives lie to Respondent's assertion that the offense here "falls within a well-recognized category of public welfare offenses that dispenses with a *mens rea* requirement." Brief in Opp. at 11. There is no "well-recognized category."[5]

Finally, Respondent's erroneous assertion that the offense here involves a "traffic violation," and not a trespass, high centers on this Court's refusal to accept "as a general rule the Government's suggestion that [crimes involving] dangerous and regulated items" are exempt from the *mens rea* requirement. *Staples*, 511 U.S. at 614. "[W]e probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates." *Id.* Why therefore, should strict liability apply to the owner whose motor vehicle, "wholly unbeknownst to him," in the midst of a blinding blizzard, drifts into an unmarked wilderness area? To paraphrase this Court's holding in *Staples*, 511 U.S. at 620:

> [A holding that *mens rea* is required regarding Mr. Unser] depends critically on our view that if Congress had intended to make outlaws of [snowmobilers] who were wholly ignorant of [their entry into a wilderness area in the midst of a blizzard],

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[5] One reason why there is no such "well-recognized category": "Assume that a motorist has crossed the center line of the highway at a place where this is prohibited. The fact that he did so unintentionally and without negligence may be no defense to a charge of traffic violation; but it will be a complete defense to a charge of manslaughter if a fatal traffic accident should result. That would be innocent homicide – homicide without the normal *mens rea*." R. Perkins, *Criminal Law*, 794-795 (2d ed. 1969).

> and to subject them to [severe penalties], it would have spoken more clearly to that effect.

The Tenth Circuit's decision is in conflict with this holding.

IV. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER FEDERAL COURTS OF APPEALS.

Respondent asserts that the holding of the Tenth Circuit is not in conflict with the holdings of the Ninth Circuit because the phrases "[p]lacing or allowing" (*United States v. Semenza*, 835 F.2d 223 (9th Cir. 1987)) and "permits or suffers" (*United States v. Launder*, 743 F.2d 686 (9th Cir. 1984)) require a willful act, whereas the phrase "[p]ossessing or using" (*Unser*) does not. Respondent's distinction is not only deficient, it is disingenuous and must be rejected.

Respondent repeats its well-worn and erroneous assertion that there exists a "recognized category of offenses (motor vehicle offenses) that require no *mens rea*" as the primary basis for distinguishing *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), from the Tenth Circuit's decision. Respondent's assertion has no basis and must be rejected.

Respondent does not attempt to address the Tenth Circuit's failure to apply the test for a public welfare offense from *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960).

V. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY THIS COURT AND THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent asserts that because the offense at issue here is a "public welfare offense" the court may infer that "Congress would not have wanted to place the burden of proof with respect to that defense on the government." Brief in Opp. at 15. This is an impermissible inference on an inference. Respondent infers that the offense here is a "public welfare offense," then infers that Congress would not have wanted the burden of proof placed on the government.

Normally, because the necessity defense would have negated the *mens rea* element, Respondent would have had to bear the burden of proving that Mr. Unser could not claim the defense of necessity. However, because the district court held that no proof of *mens rea* was required, the burden was shifted improperly to Mr. Unser. Thus, the district court's erroneous *mens rea* ruling doomed Mr. Unser's defense.

To these conflicts and constitutional violations,[6] Respondent responds merely that the offense at issue is a public welfare offense. That response is clearly inadequate.

CONCLUSION

Respondent has failed to provide any cogent reason for rejecting Mr. Unser's request that this Court review and reverse the erroneous decision of the United States Court of Appeals for the Tenth Circuit. Therefore, Mr. Unser's Petition for *Writ* of *Certiorari* should be granted.

Respectfully submitted,

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[6] The conflicts are with the Fifth Amendment to the Constitution; *Patterson v. New York*, 432 U.S. 197 (1977); and *United States v. Talbott*, 78 F.3d 1183 (7th Cir. 1996).